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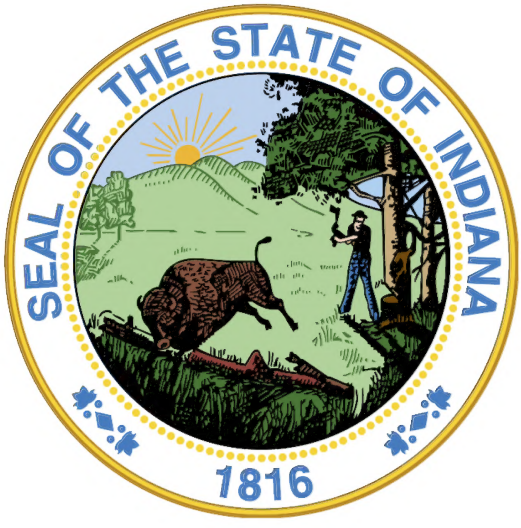
Chief Justice Roberts
Georgia, et. al., Petitioners v. Public.Resource.Org, Inc.
590 U.S. ___ ,140 S. Ct. 1498, 206 L. Ed. 2d 732



INDIANA PATTERN JURY INSTRUCTIONS

Criminal, Volume 2

Third Edition, 2019

Indiana Judges Association

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CHAPTER 11

INSANITY DEFENSE

SYNOPSIS

No. 11.01. Sample Elements Instruction.

I.C. 35-42-1-1, I.C. 35-41-3-6, I.C. 35-41-4-1, I.C. 35-36-1-1, I.C. 35-36-2-3.

The crime of murder is in part defined as follows:

A person who knowingly or intentionally kills another human being commits murder, a felony.

Before you may convict the Defendant of the crime of murder, the State must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. killed [*name*].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of murder, a felony, charged in Count _____.

If the State did prove each of these elements beyond a reasonable doubt, and the Defendant also proved by a preponderance of the evidence that at the time of such conduct, as the result of a mental disease or defect, he was unable to appreciate the wrongfulness of the conduct, then you must find the Defendant not responsible by reason of insanity.

If the State did prove each of these elements beyond a reasonable doubt, and the Defendant did not prove by a preponderance of the evidence that at the time of such conduct, as the result of a mental disease or defect, he was unable to appreciate the wrongfulness of the conduct, and you do not find that the Defendant was mentally ill at the time of the conduct, then you may find the Defendant guilty of murder, a felony, charged in Count _____.

If the State did prove each of these elements beyond a reasonable doubt, and the Defendant did not prove by a preponderance of the evidence that at the time of such conduct, as the result of a mental disease or defect, he was unable to appreciate the wrongfulness of the conduct, but you find that the Defendant was mentally ill at the time of the conduct, then you may find the Defendant guilty but mentally ill of murder, a felony, charged in Count _____.

Comments

The terms "mentally ill," "insanity," "burden of proof" and "murder" are defined by law. *See* I.C. 35-36-1-1, I.C. 35-41-3-6, I.C. 35-41-4-1 and I.C. 35-42-1-1; Instruction Nos. 11.03, 11.07, 11.05 and 11.01.

No. 11.03. Mentally Ill—Definition.

I.C. 35-36-1-1.

The term "mentally ill" means having a psychiatric disorder which substantially disturbs a person's thinking, feeling or behavior and impairs the person's ability to function; "mentally ill" also includes having any mental retardation.

(Text continued on page 11-5)

Instruction No. 11.05. Preliminary on Burden of Proof.

I.C. 35-41-4-1.

The Defendant has raised the defense of insanity. On the issue of insanity, the burden rests upon the Defendant to prove to each of you, by a preponderance of the evidence, that he was not responsible by reason of insanity at the time of the offense charged.

Instruction No. 11.07. Definition of Defense of Insanity.

I.C. 35-41-3-6 (1984).

The defense of insanity is defined by law as follows:

A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense.

"Mental disease or defect" means a severely abnormal mental condition that grossly and demonstrably impairs a person's perception, but the term does not include an abnormality manifested only by repeated unlawful or anti-social conduct.

Instruction No. 11.09. Preponderance of Evidence.

Preponderance of the evidence, as it applies to the issue of insanity, means that you must be convinced from a consideration of all the evidence in the case that the Defendant was more probably insane than sane. The number of witnesses testifying on that issue for one side or the other is not necessarily of the greater weight. Evidence which convinces you most strongly of its truthfulness is of the greater weight.

Instruction No. 11.11. Reasonable Doubt.

This instruction has been withdrawn.

Instruction No. 11.13. Presumption of Innocence.

This instruction has been withdrawn.

Instruction No. 11.15. Temporary Insanity.

This instruction has been withdrawn.

Instruction No. 11.17. Expert Witnesses — Procedure.

I.C. 35-36-2-2.

Under Indiana law, when a Defendant in a criminal case raises the defense of not responsible by reason of insanity, the court is required to appoint disinterested [psychiatrists] [physicians] [psychologists] to examine the Defendant. The court is further required to call those [psychiatrists] [physicians] [psychologists] to testify at trial concerning their opinion about the Defendant's sanity at the time of the offense.

The fact that these [psychiatrists] [physicians] [psychologists] are called as witnesses by the court does not mean the court necessarily approves or sanctions their testimony. You should weigh, evaluate, and scrutinize the testimony of the court's psychiatric witnesses in the same manner you would the witnesses called by the Defendant and the State.

Instruction No. 11.19. Expert Testimony — Weight.

The jury is not bound by the opinions or conclusions of experts who have testified as to what is a mental disease or mental defect. Mental disease or mental defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls. Thus, you are instructed to consider expert testimony in light of all other testimony presented concerning the development, adaptation and functioning of the Defendant's mental and emotional processes and behavior controls and not necessarily accept the ultimate conclusions of the experts as to the Defendant's legal sanity or insanity. This is your decision and only your decision. You must decide the extent of the Defendant's mental disability, if any.

Instruction No. 11.20. Consequences of Not Guilty By Reason of Insanity or Guilty But Mentally Ill Verdicts

If the Defendant is found guilty but mentally ill at the time of the crime, the court will sentence the Defendant in the same manner as a Defendant found guilty of the offense. The Defendant will then be further evaluated and treated as is psychiatrically indicated for his illness.

If the Defendant is found not responsible by reason of insanity at the time of the crime, the prosecuting attorney will file a petition for mental health commitment with the court. The court will hold a mental health commitment hearing at the earliest opportunity. The Defendant will be detained in custody until the completion of the hearing. If the court finds that the Defendant is mentally ill and either dangerous or gravely disabled, then the court may order the Defendant to be either placed in an outpatient treatment program of not more than ninety (90) days, or committed to an appropriate mental health facility until a court determines commitment is no longer needed.

Comments

"When the verdict options before a jury include not responsible by reason of insanity or guilty but mentally ill, and the Defendant requests a jury instruction on the penal consequences of these verdicts, the trial court is required to give an appropriate instruction or instructions as the case may be." *Georgopolus v. State*, 735 N.E.2d 1138 (Ind., Sept. 29, 2000). The instruction above is suggested by the *Georgopolus* case.

CHAPTER 12

EVIDENCE

SYNOPSIS

Instruction No. 12.01. Direct Evidence and Circumstantial Evidence.

The parties in this case may prove a fact by one of two types of evidence—direct evidence or circumstantial evidence.

Direct evidence is direct proof of a fact. Circumstantial evidence is indirect proof of a fact.

For example, direct evidence that an animal ran in the snow might be the testimony of someone who actually saw the animal run in the snow. On the other hand, circumstantial evidence that an animal ran in the snow might be the testimony of someone who only saw the animal's tracks in the snow.

It is not necessary that any fact be proved by direct evidence. You may consider both direct evidence and circumstantial evidence as proof.

Comment

This instruction has been rewritten. It is now to be used when counsel have referred to the "direct" and "circumstantial" distinction in their arguments. It now is intended to provide a readily understood example of each type of evidence, and utilizes the civil pattern instruction language.

(Text continued on page 12-3)

Instruction No. 12.03. Defendant's Statement.

Evidence has been introduced that the Defendant made a statement concerning the crime charged. It is for you to determine, in light of all the circumstances under which the statement was made, what weight should be given to the statement.

Comments

It may be appropriate to instruct the jury on its duty to determine the credibility of a defendant's confession. *See Shanabarger v. State*, 846 N.E.2d 702, 710 (Ind. Ct. App. 2006), *trans. denied*. But to avoid unnecessarily emphasizing a defendant's confession over other evidence, the Committee recommends this instruction not be given unless tendered by the defendant and where the voluntariness of the statement has been challenged.

Evidence bearing on the voluntariness of a confession and evidence bearing on its credibility often overlap. *Crane v. Kentucky*, 476 U.S. 683, 687 (1986). It is the role of the trial court—not the jury—to determine whether a statement made by a defendant is voluntary and therefore admissible. *Crain v. State*, 736 N.E.2d 1223, 1232 (Ind. 2000). But after a statement is admitted into evidence, it then becomes the duty of the jury to evaluate the credibility of the statement and to decide how much weight to give it. *Id.*; *see also Morgan v. State*, 648 N.E.2d 1164, 1169–70 (Ind. Ct. App. 1995), *adopted in relevant part*, 675 N.E.2d 1067, 1072 (Ind. 1996) (noting trial court makes an initial admissibility determination based on voluntariness of a confession, but jury separately assesses credibility of the confession which may also include considering its voluntariness).

Instruction No. 12.09. Defendant's Statement—Multiple Defendants.

A Defendant's statement concerning the crime charged may not be considered by you against any Defendant other than the one who made it.

(Text continued on page 12-5)

Comments

This instruction is for trials with two or more defendants.

The instruction may become an issue in three situations:

(1) The instruction must be given on request when:

- A statement from one defendant who does not testify is offered as evidence;
- The statement is admissible because it does "not refer directly to the [co]defendant himself, but [becomes] incriminating [with respect to the codefendant] 'only when linked with evidence introduced later at trial,'" *Gray v. Maryland*, 523 U.S. 185, 196, 118 S.Ct. 1151, 1157, 140 L.Ed.2d 294 (1998); and
- The codefendant requests the instruction.

Under these circumstances, admitting the statement with the instruction does not violate the codefendant's confrontation rights. *Gray v. Maryland, supra*; *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987).

(2) The instruction will not avoid reversible error if:

- A statement from a defendant who does not testify is offered as evidence;
- The statement is **inadmissible** because, considered by itself, it incriminates the codefendant, so that admitting it unchanged will violate the codefendant's confrontation rights, *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968); and
- The codefendant objects.

In this situation, the statement may perhaps be made admissible by "redaction" to remove all inferences which might incriminate the objecting codefendant. If it cannot be redacted sufficiently, it must be excluded, and admitting it with the instruction is a constitutional error.

The Committee notes for the judge that extensive "redaction" is often needed and even then may be inadequate. A redaction which simply "replace[s] a proper name with an obvious blank, the word 'delet[ed],' a symbol, or similarly notif[ies] the jury that a name has been deleted" violates *Bruton*, when the statement "obviously refer[s] directly to someone, often obviously to [codefendant], and involve[s] inferences [incriminating codefendant] that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." *Gray v. Maryland, supra*, 523 U.S. at 195 and 196, 118 S. Ct. at 1156 and 1157.

(3) The instruction is properly used when:

- A defendant testifies;
- That defendant's statement is offered as evidence against him;
- The statement may incriminate the codefendant;
- The testifying defendant is subject to full and effective cross-examination about the statement, so that codefendant has no *Bruton* confrontation objection to the statement. *See Nelson v. O'Neil*, 402 U.S. 622, 627, 91 S.Ct. 1723, 1726, 29 L.Ed.2d 222 (1971)("[t]he Constitution as construed in *Bruton*, in other words, is violated only where the out-of-court hearsay

statement is that of a declarant who is unavailable at the trial for 'full and effective' cross-examination");

- The statement is hearsay as to the codefendant under Evidence Rule 801 (e.g., the statement was not sworn and is inconsistent with the testifying Defendant's testimony); and
- The codefendant requests, pursuant to Indiana Evidence Rule 105, a limiting instruction that the statement may not be considered against him.

Instruction No. 12.11. Multiple Defendants — Separate Consideration.

You should give separate consideration to each Defendant. Each Defendant is entitled to have his case decided on the evidence and the law that applies to him/her.

Any evidence which was limited to [one Defendant] [some Defendants] should not be considered by you as to any other Defendant[s].

Comments

This instruction is the same as Preliminary Instruction 1.23 except the tense has been changed for use as a final instruction.

Instruction No. 12.13. Dying Declaration.

This instruction has been withdrawn.

Comment

The Committee recommends that this instruction be deleted. The admission into evidence of a dying declaration is a function for the trial judge under Rule 804(b)(2). Once it is admitted, the general instruction about weighing evidence is sufficient.

Instruction No. 12.15. Evidence of Defendant's Reputation.

This instruction has been withdrawn.

Comment

The committee recommends that this instruction be withdrawn. The admission of reputation evidence is a function for the trial judge. Once the evidence is admitted, the general instruction about consideration of evidence is sufficient.

Instruction No. 12.17. Other Crimes, Wrongs, or Acts.

Indiana Rule of Evidence 404(b).

Evidence has been introduced that the Defendant was involved in (crimes) (a crime) (wrongful conduct) (bad acts) other than (those) (that) charged in the information. This evidence has been received solely on the issue of Defendant's (identity) (motive) (intent) (preparation) (plan) (knowledge) (absence of mistake) (absence of accident) (sanity). This evidence should be considered by you only for that limited purpose.

Comments

This instruction may be given as an admonition simultaneously with the admission of Indiana Evidence Rule 404(b) evidence. Under Evidence Rule 105 defense counsel must request the admonition and the court is not required to give it *sua sponte*.

Instruction No. 12.19. Impeachment and Substantive Evidence

This instruction is withdrawn, as it no longer "reflect[s] current law and should not be used in trials in this state," *Humphrey v. State*, 680 N.E.2d 836, 840 (Ind. 1997).

Instruction No.12.21 Impeachment — Prior Inconsistent Statements.

The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness [made a statement] [made a written statement] [in former testimony testified] [acted in a manner] inconsistent with his testimony in this case. Evidence of this kind may be considered by you in deciding the value of the testimony of the witness.

Instruction No. 12.23. Escape.

This instruction has been deleted.

Comments

Instructions on flight should not be given. *Dill v. State*, 741 N.E.2d 1230 (Ind. 2001). The same rationale for concluding flight instructions are error applies to instructions on escape, and so the Committee has deleted this instruction.

Instruction No. 12.25. Flight.

This instruction has been deleted.

Comments

Instructions on flight should not be given. *Dill v. State*, 741 N.E.2d 1230 (Ind. 2001).

Instruction No. 12.27. Motive.

Motive is what causes a person to act. The State is not required to prove a motive for the crime charged.

Instruction No. 12.29. Expert Testimony — Hypothetical Question.

A person who has specialized education, knowledge or experience is permitted to express an opinion in those areas. You should evaluate this testimony as you would other evidence in this case. You should also consider the witness's skill, experience, knowledge, and familiarity with the facts of this case.

[Questions have been asked in which the witness was asked to assume that certain facts were true and to give an opinion based upon those facts. If you find that any assumed fact is not true, you may consider that in determining the value of the opinion.]

Comments

The bracketed second paragraph should be given only if hypothetical questions are involved.

Instruction No. 12.31. Opinion of Layperson.

Comment: This instruction is withdrawn. The Committee suggests that Instruction 12.29 can be modified to cover this issue if a judge considers an instruction necessary. Rule 701 greatly expands the areas in which lay opinions can be given beyond the issues listed in the withdrawn instruction.

Instruction No. 12.33. Testimony of an Accomplice.

Comment: This instruction is withdrawn as it is covered by the general instruction on credibility of witnesses.

Instruction No. 12.35. Date of Crime Charged.

I.C. 35–34–1–2.

The State is not required to prove that the crime charged was committed on the particular date [during a particular time period] alleged in the [information] [indictment].

Comments

This instruction should be given only when there is a variance between the date alleged in the indictment or information and the evidence, and all dates are within the period of limitation.

Note: This instruction cannot be used when an alibi response by the State alleges a specific date and time and the Defendant asserts a defense. Then, proof of the date and time becomes an element. See Comments to Instruction No. 10.21, Alibi.

Instruction No. 12.37. Statute of Limitation — Defendant Out of State.

I.C. 35–41–4–2.

It is a defense to the crime charged that the case did not begin within the time allowed by law.

A person may not be found guilty of [insert name of crime charged] unless the case began

[within five years after the commission of the crime *(if B,C, or D felony)*]

[within two years after commission of the crime *(if misdemeanor)*]

[before the date the alleged victim reached thirty-one (31) years of age *(if child molesting under I.C. 35–42–4–2(a), vicarious sexual gratification, child solicitation, child seduction or incest)*]

[within five years after commission of the crime if at the time of the crime the Defendant was at least sixteen years of age and the alleged victim was not more than two years younger than the Defendant *(for child molesting under I.C. 35–42–4–3(c)(repealed) or I.C. 35–42–4–3(d) (repealed)*]

[within five years after maturity of the instrument *(if the crime is forgery or uttering a forged instrument)*].

[This case began on _____ (use if parties agree on beginning date.]

[or]

[A case begins on the earlier of the following events: the date the charge was filed, the date a valid arrest warrant for the crime was issued, or the date the Defendant was lawfully arrested without a warrant].

The time period for beginning a criminal case does not include any period of time:

[the Defendant was not usually and publicly residing in Indiana]

[or]

[the Defendant concealed himself so that he could not be officially notified of the case against him]

[or]

[the Defendant concealed evidence of the offense and evidence of the offense was unknown to the prosecuting attorney and could not have been discovered by the prosecutor by exercise of due diligence]

[or]

[the Defendant was elected or appointed to an office under a statute or the constitution, and the offense charged is theft or conversion of public funds or bribery while in public office].

The burden is on the State to prove beyond a reasonable doubt that the case did begin within the time allowed by law.

Comments

The Committee notes that in many circumstances the facts concerning the commencement of an action will not be in dispute and that a judge may determine the issue of the statute of limitations defense in ruling on a motion to dismiss. When there is an evidentiary dispute as to the date the action commenced or whether the statute has been tolled, Defendant may have a right to trial by jury on such issues.

A case commences on the earlier of date of filing of indictment or information, date of issuance of valid arrest warrant, or date of lawful arrest without a warrant.

Prosecution for Murder or a Class A felony may be commenced at any time.

If a case is dismissed, a new prosecution may be commenced within ninety (90) days after dismissal even if the period of limitation has expired at the time of the dismissal or will expire within ninety (90) days after dismissal even if the period of limitation has expired at the time of the dismissal or will expire within ninety (90) days of the dismissal, I.C. 35–41–4–2(f). Commencement of an action is defined in I.C. 35–41–4–2(h).

The Committee also recommends that the following language be inserted as an element in the general elements instruction: the case did begin within the time allowed by law.

Instruction No. 12.39. Agreed Facts.

When the parties agree to certain fact[s], you should accept the fact[s] as true.

Instruction No. 12.41. Judicially Noticed Facts.

The Court has taken judicial notice that _____. You may, but are not required to, accept this as true.

Comments

Indiana Evidence Rule 201(b) requires the jury in a criminal case be allowed to reject judicially noticed facts.

Instruction No. 12.43. Depositions — Transcripts.

I.C. 35–37–4–3.

Some evidence was presented through a [deposition] [transcript of testimony] which was read to you. It is your duty to decide the value you give to this evidence. The significance of this evidence should be determined in the same manner other evidence is evaluated.

Instruction No. 12.45. Inspection of Place

Ind. Jury Rule 25; I.C. 35–37–2–5.

The court will allow the jury to see [*state what is to be inspected*].

During your trip to and from the place to be inspected, you are not to discuss this case or any subject connected with the trial among yourselves or with anyone else.

The court has appointed (*name person*) to show the place to you. While you are away from the courtroom for this inspection, you are not to speak with any person other than (*name person appointed*) about any subject connected with the trial

At the place of inspection you are to remain together as a group. You are not to conduct an independent investigation.

What you see at the scene is not to be considered as evidence or in contradiction of evidence given in this case. The purpose of the inspection is to help each of you better understand and evaluate the evidence that is admitted in the courtroom.

CHAPTER 13

GENERAL INSTRUCTIONS

SYNOPSIS

Instruction No. 13.01. Instructions to Be Considered as a Whole.

You are to consider all of the instructions [both preliminary and final] together. Do not single out any certain sentence or any individual point or instruction and ignore the others.

Instruction No. 13.03. Duty of Judge and Jury.

See Preliminary Instruction No. 1.03.

[**Preliminary Instruction 1.03:**

Under the Constitution of Indiana you have the right to determine both the law and the facts. The Court's instructions are your best source in determining the law.]

Instruction No. 13.05. Issue for Trial.

See Preliminary Instruction 1.07.

[Preliminary Instruction 1.07:

In this case, the State of Indiana has charged the Defendant with [Count 1: (*name of charge in Count 1*), Count 2: (*name of charge in Count 2*), etc.] The charge(s) read(s) as follows:

[*insert the Charge*].]

Instruction No. 13.07. Information/Indictment Not Evidence.

See Preliminary Instruction 1.11. The Committee recommends giving that instruction without the last sentence as a final instruction. The Committee also notes that Instruction 13.01 in effect incorporates Preliminary Instruction 1.11.

[**Preliminary Instruction 1.11:**

The charge that has been filed is the formal method of bringing the Defendant to trial. The filing of a charge or the Defendant's arrest is not to be considered by you as any evidence of guilt.

A plea of not guilty has been entered on behalf of the Defendant.]

Instruction No. 13.09. Presumption of Innocence—Burden of Proof.

See Preliminary Instruction 1.13.

[Preliminary Instruction 1.13:

Under the law of this State, a person charged with a crime is presumed to be innocent. This presumption of innocence continues in favor of the Defendant throughout each stage of the trial and you should fit the evidence presented to the presumption that the Defendant is innocent, if you can reasonably do so.

If the evidence lends itself to two reasonable interpretations, you must choose the interpretation consistent with the defendant's innocence. If there is only one reasonable interpretation, you must accept that interpretation and consider the evidence with all the other evidence in the case in making your decision.

To overcome the presumption of innocence, the State must prove the Defendant guilty of each element of the crime charged, beyond a reasonable doubt.

The Defendant is not required to present any evidence to prove his innocence or to prove or explain anything.

Comment

This instruction has been modified to comply with *McCowan v. State*, 27 N.E.3d 760 (Ind. 2014). *McCowan* holds that the second sentence of the first paragraph must be given if requested by the defense; the Instructions Committee believes that this sentence should always be given to avoid inadvertent reversible error and an issue for post-conviction relief.

McCowan also leaves it to the judge's discretion whether to use language equivalent to that in the second paragraph. The Instructions Committee believes that the language in the second paragraph will almost invariably apply under the three part standard of review for tendered criminal jury instructions and recommends its use in every case.

(Text continued on page 13-7)

Instruction No. 13.10. Burden of Proof—Reasonable Doubt—Final Instruction.

See Preliminary Instruction No. 1.15.

[Preliminary Instruction 1.15:

The burden is upon the State to prove beyond a reasonable doubt that the Defendant is guilty of the crime(s) charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the Defendant's guilt. But it does not mean that a Defendant's guilt must be proved beyond all possible doubt.

A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the Defendant's guilt, after you have weighed and considered all the evidence.

A Defendant must not be convicted on suspicion or speculation. It is not enough for the State to show that the Defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The State does not have to overcome every possible doubt.

The State must prove each element of the crime(s) by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance. [In determining whether the guilt of the accused is proven beyond a reasonable doubt, you should require that the proof be so conclusive and sure as to exclude every reasonable theory of innocence.]

If you find that there is a reasonable doubt that the Defendant is guilty of the crime(s), you must give the Defendant the benefit of that doubt and find the Defendant not guilty of the crime under consideration.]

Comment

The bracketed language in this instruction was written by the Indiana Supreme Court for use in cases in which the trial judge makes the determination that all the evidence of guilt of the *actus reus* elements of the crime is circumstantial:

> To preserve our historic recognition that juries in criminal cases should be reminded to use particular caution when considering whether to find guilt based solely on crucial circumstantial evidence, we conclude that a special instruction is appropriate, but we reformulate the manner of use and language of the instruction. First, we find it inappropriate to include language burdening the jury with the task of deciding whether to apply the reasonable theory of innocence standard. Whether an instruction is supported by the evidence is a matter for the trial court to determine, and it need not be reevaluated by the jury. Second, because Indiana jurisprudence recognizes the importance of such an instruction in certain cases involving circumstantial evidence but our case law reveals a reluctance to find reversible error for failure to give the instruction if there is substantial direct evidence of guilt, we elect to apply the approach taken in *Spears* and direct that the "reasonable theory of innocence" instruction is

appropriate only where the trial court finds that the evidence showing that the conduct of the defendant constituting the commission of a charged offense, the *actus reus*, is proven exclusively by circumstantial evidence. As discussed above, to deny the availability of a "reasonable theory of innocence" instruction whenever there is *any* direct evidence of the fact that a criminal offense has occurred, however, could render the instruction unlikely ever to be used, but requiring the instruction whenever there is *no* direct evidence of any single element would compel its use in almost all criminal cases because *mens* rea is often shown *only* by circumstantial evidence.

We thus hold that, when the trial court determines that the defendant's conduct required for the commission of a charged offense, the *actus reus*, is established exclusively by circumstantial evidence, the jury should be instructed as follows: *In determining whether the guilt of the accused is proven beyond a reasonable doubt, you should require that the proof be so conclusive and sure as to exclude every reasonable theory of innocence.*

Hampton v. State, 961 N.E.2d 480, 490–91 (Ind. 2012) (emphasis in original).

Instruction No. 13.10 above incorporates the elements of the instruction approved in *Winegeart v. State*, 665 N.E.2d 893 (Ind. 1996). The briefer instruction from *Winegeart* is reproduced below for judges who prefer it:

The government has the burden of proving the Defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crime charged, you should find the Defendant guilty. If, on the other hand, you think there is a real possibility that the Defendant is not guilty, you should give the Defendant the benefit of the doubt and find the Defendant not guilty.

Instruction No. 13.11. Credibility of Witnesses—Weighing Evidence.

See Preliminary Instruction 1.17. The Committee notes that Instruction 13.01 in effect incorporates Preliminary Instruction 1.17.

[**Preliminary Instruction 1.17:**

You are the exclusive judges of the evidence, which may be either witness testimony or exhibits. In considering the evidence, it is your duty to decide the value you give to the exhibits you receive and the testimony you hear.

In determining the value of a witness's testimony, some factors you may consider are:

the witness's ability and opportunity to observe;

the behavior of the witness while testifying;

any interest, bias or prejudice the witness may have;

any relationship with people involved in the case;

the reasonableness of the testimony considering the other evidence;

your knowledge, common sense, and life experiences.

You should not disregard the testimony of any witness without a reason and without careful consideration. If you find conflicting testimony, you must determine which of the witnesses you will believe and which of them you will disbelieve.

The quantity of evidence or the number of witnesses need not control your determination of the truth. You should give the greatest value to the evidence you find most convincing.]

(Text continued on page 13-9)

Comment

This instruction does not have to be re-read if the language incorporating the preliminary instructions is used in Instruction Number 13.11.

Instruction No. 13.13. Recalling Evidence.

See Preliminary Instruction 1.21. The Committee recommends giving only as a preliminary instruction. The Committee also notes that Instruction 13.01 in effect incorporates by reference Preliminary Instruction 1.11.

[Revised Pattern 1.21

You must decide the facts from your memory of the testimony and exhibits admitted for your consideration. You may take notes during the trial. However, do not become so involved in note taking that you fail to listen carefully and observe the witnesses as they testify.]

Instruction No. 13.15. Sympathy — Prejudice.

Your verdict should be based on the law and the facts as you find them. It should not be based on sympathy or bias.

Instruction No. 13.17. Rulings of Court.

See Preliminary Instruction 1.19. The Committee recommends giving only as a preliminary instruction.

Instruction No. 13.19. Statements by Counsel.

Statements made by the attorneys are not evidence.

Instruction No. 13.20. Defendant Refuses Cross-Examination.

Once the Defendant has testified, the Defendant has no right to refuse to be cross-examined. The Defendat must answer questions when directed by the Court to do so. If the Defendant refuses to answer a question, you may consider that refusal in weighing Defendant's credibility.

Comments

A version of this instruction was approved in *Benefiel v. State*, Ind., 578 N.E.2d 338, 348 (1991). The instruction might best be used as an admonition during trial. Striking testimony of the defendant who refuses cross-examination is authorized in some jurisdictions, if the questions defendant refuses to answer are relevant to the charged offense and the refusal results in a distortion of the defendant's testimony on direct. *See People v. Figueroa*, 719 NE.2d 108 (Ill. App. 1st Dist. 1999).

Instruction No. 13.21. Defendant does not testify.

No defendant may be compelled to testify. A defendant has no obligation to testify.

The Defendant did not testify. You must not consider this in any way.

Comments

A criminal defendant has a Fifth Amendment right to have this instruction given upon request. *Carter v. Kentucky* (1981), 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241.

A criminal defendant also has the right to have this instruction not be given. Indiana Constitution, Article I, § 14; *Priest v. State* (1979), 270 Ind. 449, 386 N.E.2d 686, BUT:

IN A JOINT TRIAL, one codefendant's Indiana right not to have the instruction given must give way to the other codefendant's Fifth Amendment right to have the instruction given. *Lucas v. State* (1986), Ind., 499 N.E.2d 1090; *Horan v. State* (1994), Ind., 642 N.E.2d 1374.

Instruction No. 13.22. Defendant Testifies.

You should judge the testimony of the Defendant as you would the testimony of any other witness.

Instruction No. 13.23. Jury Deliberations.

To return a verdict, each of you must agree to it.

Each of you must decide the case for yourself, but only after considering the evidence with the other jurors. It is your duty to consult with each other. You should try to agree on a verdict, if you can do so without compromising your individual judgment. Do not hesitate to re-examine your own views and change your mind if you believe you are wrong. But do not give up your honest belief just because the other jurors may disagree, or just to end the deliberations. After the verdict is read in court, you may be asked individually whether you agree with it.

When you begin, select one of your members as foreperson to manage the deliberations.

No one will be allowed to hear your discussions and no recording will be made of what you say. The bailiff is available to assist you with personal needs, but cannot answer any questions about the case.

Any question for [the Court] [me] must be in writing and given to the bailiff. [The Court often is] [I often am] not allowed to answer your questions, except by re-reading all of the jury instructions. Because [the Court has] [I have] given you those instructions, you may be able to answer your questions by reviewing them.

If there is a break in deliberations, do not talk about this case among yourselves or with anyone else.

[The Court is] [I am] submitting to you forms of possible verdicts you may return. The foreperson should sign and date the verdict[s] to which you all agree. Do not sign any verdict form for which there is not unanimous agreement. Sign only one verdict form for each count. The foreperson must return all verdict forms, signed or unsigned.

When you have agreed upon a verdict[s], inform the bailiff. When the parties are present, you will be brought back to court for the verdict to be read. After you return a verdict, you are under no obligation to discuss it with anyone.

Comments

Baker v. State, 948 N.E.2d 1169 (Ind. 2011) holds that when "evidence is presented of a greater number of separate criminal offenses than the defendant is charged with," *id.* at 1175, and the State does not "in its discretion designate a specific act (or acts) on which it relies to prove" the charge, *id.* at 1177, this instruction on unanimity will not suffice. Instead, Instruction No. 13.24A or Instruction No. 13.24B should be given.

Instruction No. 13.24. Duty of Alternate Juror in Deliberations.

[Mr.][Ms.] [*name of alternate juror*], you have been selected as an alternate juror.

Your duties are the same as those of the regular jurors, except you must not participate in the deliberations or voting of the jury unless I direct you to do so.

The foreperson shall prevent alternate jurors from deliberating or voting with the jury. The foreperson shall promptly report any violation of this instruction to me.

Comments

Use this instruction when allowing the alternate juror to retire with the jury during deliberations.

Alternates are permitted to discuss the case before deliberations begin. "[J]urors, including alternates, are permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence." Ind. Jury Rule 20(a)(8).

Instruction No. 13.24A. Unanimous Decision on Crime.

The Defendant is accused in Count _____ of having committed (*name crime*) against [*name alleged victim*] between (*insert date*) and (*insert date*).

The State has presented evidence that the Defendant may have committed more than one act of (*name crime*) against (*name alleged* victim) between (*insert date*) and (*insert date*). Before you may find the Defendant guilty, you must all unanimously find and agree that the State proved beyond a reasonable doubt the Defendant committed the same specific, single act of (*name crime*) against (*name alleged* victim) between (*insert date*) and (*insert date*).

If you find the Defendant guilty, your verdict does not have to specify the particular act of (*name crime*) Defendant committed.

Comments

The instruction is to be used as follows:

1. when "evidence is presented of a greater number of separate criminal offenses than the defendant is charged with" in a single count;

   and

2. the evidence is of a number of discrete, differentiated episodes of criminal conduct each of which constitutes the crime charged

   and

3. the State elects not to designate a specific act or episode on which it will rely to prove the charge;

   then

4. the jurors should be instructed that in order to convict the defendant they must unanimously agree that the defendant committed the same single specific act or episode which constitutes the charged offense.

This instruction is a modified version of the instruction suggested "as a useful model" by the Indiana Supreme Court in *Baker v. State*, 948 N.E.2d 1169, 1177 (Ind. 2011).

Alternative form of instruction:

The court and parties may wish to instruct the jury on each of the specific crimes the evidence indicates defendant may have committed on different occasions within the charged period. The instruction below is drafted for that situation.

The Defendant is accused in Count _____ of having committed (*name crime*) against [*name alleged victim*] between (*insert date*) and (*insert date*).

The State has presented evidence that the Defendant may have committed more than one act of (*name crime*) against (*name alleged* victim) between (*insert date*) and (*insert date*). Before you may find the Defendant guilty, you must all unanimously find and agree that the State proved beyond a reasonable doubt one of the following:

[That the Defendant committed the act of (*name crime*) against (*name alleged victim*) on (*insert first date*) at (*insert place*).]

[or]

[That the Defendant committed the act of (*name crime*) against (*name alleged victim*) on (*insert second date*) at (*insert place*).]

[or]

[That the Defendant committed the act of (*name crime*) against (*name alleged victim*) on (*insert third date*) at (*insert place*).]

If you find the Defendant guilty, your verdict does not have to specify the particular act of (*name crime*) Defendant committed or the time it was committed.

Instruction No. 13.24B. Unanimous Decision on "Generic Evidence" of Multiple Acts.

The Defendant is accused in this case of having committed the crime of [*name alleged crime*] against [*name victim*] during [*state alleged time period*].

The State has presented evidence that the Defendant may have committed more than one act of [*name alleged crime*] against [victim] during [date]. The evidence described multiple acts that may constitute the crime of [*name alleged crime*]. Before you may find the Defendant guilty of the crime of [*name alleged crime*] in the case:

(1) You must all unanimously find and agree that the State proved

beyond a reasonable doubt that the Defendant committed all acts of [*name alleged crime*] against [*name victim*] described in the evidence during [*specify time period alleged*].

Or

(2) You must all unanimously find and agree that the State proved beyond

a reasonable doubt that the Defendant committed the act of [*name alleged crime*] against [*name victim*] in [*specify first time alleged in the charge*]

Or

(3) You must all unanimously find and agree that the State proved beyond

a reasonable doubt that the Defendant committed the act of [*name alleged crime*] against [*name victim*] in [*specify second time alleged in the charge*].

If you find the Defendant guilty, your verdict does not have to specify the particular act of [*name alleged crime*] Defendant committed or the time it was committed.

Comments

The instruction is to be used as follows:

1. when "evidence is presented of a greater number of separate criminal offenses than the defendant is charged with" in a single count;

   and

2. the evidence is either entirely or partly of a pattern of criminal conduct rather than of discrete, differentiated episodes of criminal conduct each of which constitutes the crime charged

   and

3. the State elects not to designate a specific act or episode on which it will rely to prove the charge;

   then

4. the jurors should be instructed that in order to convict the defendant

   (a) either they must unanimously agree that the defendant committed the same criminal act or acts,

(b) or they must unanimously agree that the defendant committed all of the criminal acts

(i) on which evidence was presented

and

(ii) which were included within the time period charged.

This instruction is a modified version of the instruction suggested "as a useful model" by the Indiana Supreme Court in *Baker v. State*, 948 N.E.2d 1169, 1177 (Ind. 2011).

Alternative form of instruction:

Here is an alternative form of a unanimity instruction on "generic evidence" of multiple acts:

The Defendant is accused in Count _____ of having committed the crime of (*name crime*) against [*name alleged victim*] between (*insert date*) and (*insert date*).

The State has presented evidence that the Defendant may have committed more than one act of (*name crime*) against (*name alleged victim*) between (*insert date*) and (*insert date*). [Some of the evidence] [The evidence] described acts that may constitute the crime of (*name crime*) without specifying the particular times at which the acts occurred. Before you may find the Defendant guilty of the crime of (*name crime*) in Count _____, you must all unanimously find and agree that the State proved beyond a reasonable doubt either:

(1) That the Defendant committed all the acts of (*name crime*) against (*name alleged victim*) described in the evidence, between (*insert date*) and (*insert date*)

or

(2) That the Defendant committed the same specific act or acts of (*name crime*) against (*name alleged victim*) between (*insert date*) and (*insert date*).

If you find the Defendant guilty, your verdict does not have to specify the particular act of (*name crime*) Defendant committed or the time it was committed.

(Text continued on page 13-21)

Instruction No. 13.25. Penalty Imposed by Court.

These instructions do not contain any information concerning a possible sentence. The Court alone is responsible for sentencing if there is a conviction.

Comments

This instruction should not be used in a capital or life without parole case.

Instruction No. 13.27a. Included Offense Introduction

[Instruction Numbers 13.27a, 13.27b, and 13.27c should be given together and in sequence when a lesser included offense instruction is given.]

The Defendant is charged with [*charged offense*]. [*Name included offense(s)*] is/are included in Count I [*name charged offense*]. If the State proves the Defendant guilty of [*the charged offense*], you need not consider the included crime(s). However, if the State fails to prove the Defendant committed [*name charged offense*], you may consider whether the Defendant committed [*name included offense(s)*], which the Court will define for you.

You must not find the Defendant guilty of more than one crime for each count.

Note: The Committee recommends that when naming the charged or included offense both the name [e.g., "Theft"] and the level of crime [e.g., "a class D felony"] be stated.

Instruction No. 13.27b. Charged offense—elements.

[Give standard instruction on charged offense, which should conclude with the following paragraph:]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of _____, a Class _____, as charged in Count _____.

Instruction No. 13.27c. Included offense—elements.

You may then consider any included crime. The crime of [*name included offense*] is included in the charged crime of [*name charged offense*].

[Give standard elements instruction of included offense, replacing the last paragraph with the following:]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of [included offense] as included in Count _____.

Note: If there are more included offenses repeat the standard elements instruction for any additional included offenses.

Comments

The Indiana law for instructing on included offenses is substantial in extent and is beyond the scope of this work. The Committee suggests that initial resort be to *Wright v. State*, 658 N.E.2d 563 (Ind. 1995). *See also Garrett v. State*, 756 N.E.2d 523 (Ind. Ct. App. 2001), which holds that it is not reversible error to give lesser included instructions merely because the defendant has objected.

Instruction No. 13.29. Consider Separate Counts Individually.

In this case, the Defendant is charged with _____ counts of criminal offenses. Although all of counts are contained within one charging document, you are to consider the law and the evidence as it may apply to each count individually and separately from the other counts.

Instruction No. 13.31. Admonition at Breaks in Deliberations.

Jury Rules 26 and 29.

Members of the jury, we will now have a break in deliberations. During this break:

(1) do not discuss the case among yourselves or with anyone else;

(2) do not talk to the attorneys, parties, or witnesses;

(3) do not express any opinion about the case;

(4) do not listen to or read any outside or media accounts of the trial;

(5) do not communicate with anyone or post information about the case, or what you are doing in the case, by any means, including telephone, text messages, email, internet chat rooms, blogs, or social websites; and

(6) do not Google or otherwise search for any information about the case, or the law that applies to the case, or the people involved in the case, including the parties, witnesses, lawyers, or Judge.

Comments

The trial court should add to the admonition above to provide jurors with explicit instructions on any permitted usage of cellphones or other electronic communication devices during deliberations.

Jury Rule 26 (b) provides:

> The court shall instruct the bailiff to collect and store all computers, cell phones or other electronic communication devices from jurors upon commencing deliberations. The court may authorize appropriate communications (i.e. arranging for transportation, childcare, etc.) that are not related to the case and may require such communications to be monitored by the bailiff. Such devices shall be returned upon completion of deliberations or when the court permits separation during deliberations. Courts that prohibit such devices in the courthouse are not required to provide this instruction. All courts shall still admonish jurors regarding the limitations associated with the use of such devices if jurors are permitted to separate during deliberations.

Jury Rule 29 authorizes separation of the jury during deliberations, in the court's discretion:

(a) The court, in its discretion may permit the jury in civil cases to separate during deliberations. However, before the jurors are permitted to separate, the court shall instruct them that while they are separated, they shall:

  (1) not discuss the case among themselves or with anyone else;

  (2) not talk to the attorneys, parties, or witnesses;

  (3) not express any opinion about the case;

  (4) not listen to or read any outside or media accounts of the trial.

(b) The court shall not permit the jury to separate during deliberation in

criminal cases unless all parties consent to the separation and the instructions found in section "a" of this rule are given.

CHAPTER 14

DEFINITIONS (effective for crimes committed June 30, 2014 or before)

SYNOPSIS

(Text continued on page 14-3)

Instruction No. 14.145. Owned and Controlled.

(Text continued on page 14-5)

Instruction No. 14.00.3. Abandon.

I.C. 35-46-3-0.5.

The term "abandon" means to desert an animal or to leave the animal permanently in a place without making provision for adequate long term care of the animal.

Comments

The statute provides that "[t]he term does not include leaving an animal in a place that is temporarily vacated for the protection of human life during a disaster."

(Text continued on page 14-9)

Instruction No. 14.01. Access.

I.C. 35–43–2–3.

The term "access" is defined by law as meaning to approach, instruct, communicate with, store data in, retrieve data from, or make use of resources of a computer, computer system, or computer network.

Instruction No. 14.03. Adoptive Grandparent.

I.C. 35–42–4–7.

"Adoptive grandparent" means the parent of an adoptive parent.

Instruction No. 14.05. Adoptive Parent.

I.C. 35–42–4–7.

"Adoptive parent" means an adult who has become a parent of a child through adoption.

Comments

This definition from I.C. 31–3–4–3 is expressly incorporated by the child seduction statute, I.C. 35–42–4–7. Should terms within the "adoptive parent" definition (e.g., "adoption") be at issue, *see* the adoption history definition chapter, I.C. 35–3–4.

Instruction No. 14.07. Administer.

I.C. 35–48–1–3.

The term "administer" means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient or research subject by:

(1) A practitioner or by his authorized agent; or

(2) The patient or research subject at the direction and in the presence of the practitioner.

Comments

The terms "controlled substance" and "practitioner" are defined by law. *See* I.C. 35–48–1–9 and I.C. 35–48–1–24; Instruction Nos. 14.31 and 14.157.

Instruction No. 14.08. Adult.

I.C. 35–47–10–2.

The term "adult" means a person who is at least eighteen (18) years of age.

Instruction No. 14.08.5. Agency.

I.C. 12-32-1-1.

The term "agency" means any state [administration] [agency] [authority] [board] [bureau] [commission] [committee] [council] [department] [division] [institution] [office] [service] [other similar body of state government].

Comments

For use in prosecutions of false verification of citizenship or immigration status, Instruction No. 5.53.

Instruction No. 14.09. Alcohol Abuser.

I.C. 35–47–1–2.

The term "alcohol abuser" means an individual who has had two (2) or more alcohol related offenses, any one of which resulted in conviction by a court or treatment in an alcohol abuse facility within three (3) years prior to the date of the application.

Comments

For use only with Chapter 7—Firearms offense instructions.

Instruction No. 14.09.5. Alcoholic Beverage.

I.C. 7.1-1-3-5.

The term "alcoholic beverage" means a liquid or solid that:

- is, or contains, one-half percent (0.5%) or more alcohol by volume
- is fit for human consumption, and
- is reasonably likely, or intended, to be used as a beverage.

Instruction No. 14.09.6. Ammonia Solution.

I.C. 35-48-4-14.5, 22-11-20-1.

"Ammonia solution" means any ammonia solution that contains at least ten percent (10%) by weight of free ammonia or having a vapor pressure of one (1) PSIG or above at one hundred four (104) degrees Fahrenheit.

Instruction No. 14.09.7. Animal Fighting Contest.

I.C. 35-46-3-4.

The term "animal fighting contest" means a conflict between two (2) or more animals. The term does not include a conflict that is unorganized or accidental.

Instruction No. 14.09.8. Animal Fighting Paraphernalia.

I.C. 35-46-3-4.3.

The term "animal fighting paraphernalia" means equipment used to train or condition animals for participation in an animal fighting contest.

Comments

The term "animal fighting contest" is defined in Instruction No. 14.09.7.

Instruction No. 14.09.55. Alien.

I.C. 35-44-5-2.

The term "alien" means any person not a citizen of the United States.

Comments

For use with transporting an illegal alien, Instruction No. 5.55, or harboring an illegal alien, Instruction No. 5.57.

This definition incorporates the definition of "alien" in 8 U.S.C. 1101(a) but omits the language "or national."

Instruction No. 14.10. Assault Weapon.

I.C. 35–50–2–11(a).

The term "assault weapon" means a firearm that shoots automatically more than one (1) shot without manually reloading by a single function of the trigger.

Instruction No. 14.11. Battery.

I.C. 35–42–2–1.

A "battery" is defined by law as a knowing or intentional touching of another person in a rude, insolent or angry manner.

Instruction No. 14.11.5. Beat.

I.C. 35-46-3-0.5.

The term "beat" means to unnecessarily or cruelly strike an animal, or to throw the animal against an object causing the animal to suffer severe pain or injury.

Comments

The statute provides that "[t]he term does not include reasonable training or disciplinary techniques."

Instruction No. 14.13. Bodily Injury.

I.C. 35–41–1–4.

The term "bodily injury" is defined by law as meaning any impairment of physical condition, including physical pain.

Instruction No. 14.14. Booby Trap.

I.C. 35-47.5-2-2.

"Booby trap" means a device meant to cause death or bodily injury by hiding the device or by activating the device by trip wires, switches, antidisturbance, or other remote means.

Instruction No. 14.14.1. Breaking.

The term "breaking" may include moving a door or window even if unlocked, no matter how slight the force. A breaking does not have to be a fracturing or forceful entry, but it may be inferred from the slightest force if used to gain unauthorized entry.

Comments

This instruction is meant for use in prosecutions for burglary and residential entry. *Young v. State*, 846 N.E.2d 1060 (Ind. Ct. App. 2006). To establish a breaking occurred, the State need only introduce evidence from which the jury could reasonably infer that the slightest force was used to gain unauthorized entry. *McKinney v. State*, 653 N.E.2d 115, 117 (Ind. Ct. App. 1995). For example, the opening of an unlocked door is sufficient to establish a "breaking." *Id.*

Instruction No. 14.15. Business Relationship with an Agency.

I.C. 35-41-1-4.5.

The term "business relationship with an agency" means to:

(1) Conduct a business under a license or permit granted by a state agency; or

(2) Have a pecuniary interest in a contract or purchase connected with an action of an agency; or

(3) Derive a profit from a contract or purchase connected with an action of an agency.

The term does not include employment by an entity that has a business relationsip with an agency unless the employee shares in the profits of the entity.

(Text continued on page 14-20.7)

Instruction No. 14.15.1. Card Skimming Device.

I.C. 35-43-5-4.3.

The term "card skimming device" means a device that is designed to read information encoded on a credit card. The term includes a device designed to read, record, or transmit information encoded on a credit card:

(1) directly from a credit card; or

(2) from another device that reads information directly from a credit card.

Instruction No. 14.15.3. Camera

I.C. 35-45-4-5.

"Camera" means a camera, a video camera, a device that captures a digital image, or any other type of video recording device.

Comment

This instruction is for use with Instruction No. 6.12, Voyeurism, and Instruction 6.12.1, Public Voyeurism.

Instruction No. 14.15.5. Card Skimming Device.

I.C. 35-43-5-4.3.

The term "card skimming device" means a device that is designed to read information encoded on a credit card. The term includes a device designed to read, record, or transmit information encoded on a credit card:

(1) directly from a credit card; or

(2) from another device that reads information directly from a credit card.

Instruction No. 14.16. Cause of Death.

"Cause of death" is that event which initiates a chain of events, however short or protracted, that results in the death of an individual.

(Text continued on page 14-21)

Instruction No. 14.16a. Child.

I.C. 35–47–10–3.

The term "child" means a person who is less than eighteen (18) years of age.

Instruction No. 14.16b. Child Care Worker

I.C. 35–42–4–7.

The term "child care worker" is defined by law as a person who provides care or supervison of a child within the scope of the person's employment in a public or private school or shelter facility.

Instruction No. 14.16c. Claim Statement.

I.C. 35-43-5-1.

The term "claim statement" is defined by law as meaning:

an insurance policy, a document, or a statement made in support of or in opposition to a claim for payment or other benefit under an insurance policy, or other evidence of expense, injury, or loss. The term includes statements made orally, in writing, or electronically, including the following:

(1) An account.

(2) A bill for services.

(3) A bill of lading.

(4) A claim.

(5) A diagnosis.

(6) An estimate of property damages.

(7) A hospital record.

(8) An invoice.

(9) A notice.

(10) A proof of loss.

(11) A receipt for payment.

(12) A physician's records.

(13) A prescription.

(14) A statement.

(15) A test result.

(16) X-rays.

Instruction No. 14.17. Cocaine.

I.C. 35–48–1–7.

The term "cocaine" includes coca leaves and any salt, compound, or derivative of coca leaves, and any salt, compound, isomer, derivative, or preparation which is chemically equivalent or identical to any of these substances. However, decocainized coca leaves or extraction of coca leaves that do not contain cocaine or ecgonine are not included.

(Text continued on page 14-25)

Instruction No. 14.17a. Coin Machine.

I.C. 35-43-5-1.

The term "coin machine" is defined by law as meaning:

a coin box, vending machine, or other mechanical or electronic device or receptacle designed:

(1) to receive a coin, bill, or token made for that purpose; and

(2) in return for the insertion or deposit of a coin, bill, or token automatically:

(A) to offer, provide, or assist in providing; or

(B) to permit the acquisition of;

some property.

Instruction No. 14.17c. Communicates.

I.C. 35-41-2-1.

"Communicates" includes posting a message electronically, including on a social networking web site.

Comments

This instruction is for use with Instruction No. 6.03, Intimidation.

Instruction No. 14.19. Component Part.

I.C. 9-13-2-34.

The term "component part" is defined by law as meaning an engine, a transmission, a body-chassis, a doghouse (front assembly), a rear-end, or a frame.

(Text continued on page 14-27)

Instruction No. 14.21. Computer Network and Computer System.

I.C. 35–43–2–3.

The term "computer network" is defined by law as meaning the interconnection of communication lines with a computer through remote terminals or a complex consisting of two (2) or more interconnected computers.

The term "computer system" means a set of related computer equipment, software or hardware.

Instruction No. 14.23. Computer Program.

I.C. 35–43–1–4.

The term "computer program" is defined by law as meaning an ordered set of instructions or statements that, when executed by a computer, causes the computer to process data.

Instruction No. 14.25. Confine.

I.C. 35–42–3–1.

The term "confine" is defined by law as meaning to substantially interfere with the liberty of a person.

Instruction No. 14.27. Consumer.

I.C. 35–43–6–2.

The term "consumer" means an individual who owns, leases, or rents the residential property that is the subject of a home improvement contract.

Comments

The term "home improvement contract" is defined by law. See I.C. 35–43–6–4; Instruction No. 14.109.

Instruction No. 14.29. Consumer Product.

I.C. 35–45–8–1, I.C. 16–1–28–3.

The term "consumer product" means:

[a "food," defined as articles used for food, drink, confectionary or condiment for man, chewing gum, or articles used for components of any such article;]

[or]

[a "drug," defined as articles recognized in the (*here instruct on the particular Pharmacopoeia or Formulary listed in I.C. 16–1–28–3*), articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals, or articles (other than "food") intended to affect the structure or any function of the body of man or other animals, or articles intended for use as a component of any of the articles above (except devices or their components, parts or accessories);]

[or]

[a "device," defined as instruments, apparatus, and contrivances, including their components, parts, and accessories, intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals, or to affect the structure or any function of the body of man or other animals;]

[or]

[a "cosmetic," defined as articles meant to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and articles intended for use as a component of any such articles, except that the term does not include soap;]

[or]

[an item designed to be consumed for personal care or for performing household services.]

Instruction No. 14.31. Controlled Substance.

I.C. 35–48–1–9.

The term "controlled substance" means a drug, substance, or immediate precursor in [schedule I, II, III, IV or V under

(I.C. 35–48–2–4) (I.C. 35–48–2–6) (I.C. 35–48–2–8) (I.C. 35–48–2–10) (I.C. 35–48–2–12)]

[or]

[a rule adopted by the Indiana State Board of Pharmacy.]

[*Here specify pertinent statute or rule*] provides in pertinent part that the [drug] [substance] [*here name drug or substance*] is [in schedule (*here specify schedule number*)] [an immediate precursor of (*name controlled substance*), a substance in schedule (*here specify schedule number*)].

Comments

The terms "drug" and "immediate precursor" are defined by I.C. 35–48–1–16 and I.C. 35–48–1–17, respectively, and should be defined as necessary in the particular case.

Instruction No. 14.32. Correctional Professional.

I.C. 35–42–2–1.

The term "correctional professional" means a probation officer, parole officer, community corrections worker, or home detention officer.

Instruction No. 14.32a Corrections Officer.

I.C. 35-42-2-6.

In prosecutions for battery by body waste, I.C. 35-42-2-6, the term "corrections officer" includes any person employed by [the department of correction] [a law enforcement agency] [a probation department] [a county jail] [a (circuit) (superior) (county) (probate) (city) (town) court].

Instruction No. 14.33. Counterfeit Substance.

I.C. 35–48–1–10.

The term "counterfeit substance" means a controlled substance which, or the container or labeling of which, without authorization bears the trademark, trade name, or other identifying mark, imprint, number or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person who in fact manufactured, distributed, or dispensed the substance.

Comments

The terms "controlled substance," "dispenser" and "distributor" are defined by law. *See* I.C. 35–48–1–1, I.C. 35–48–1–13 and I.C. 35–48–1–15; Instruction Nos. 14.31, 14.63 and 14.69.

Instruction No. 14.35. Credit Card.

I.C. 35–43–5–1.

"Credit card" means an instrument or device (whether known as a credit card or charge plate, or by any other name) issued by an issuer for use by, or on behalf of, the credit card holder in obtaining property.

Instruction No. 14.37. Credit Card Holder.

I.C. 35–43–5–1.

"Credit card holder" means the person to whom, or for whose benefit, the credit card is issued by an issuer.

Instruction No. 14.39. Credit Institution.

I.C. 35–41–1–5.

The term "credit institution" is defined by law as meaning a bank, insurance company, credit union, building and loan association, investment trust, industrial loan and investment company, or other organization held out to the public as a place of deposit of funds or a medium of savings or collective investment.

Instruction No. 14.41. Crime.

I.C. 35-41-1-6.

The term "crime" is defined by law as meaning a felony or a misdemeanor.

Instruction No. 14.41a. Criminal Gang.

I.C. 35-45-9-1.

The term "criminal gang" means a group with at least three (3) members that specifically

[promotes]

[or]

[sponsors]

[or]

[assists in]

[or]

[participates in]

[or]

[requires as a condition of membership or continued membership]

the commission of a felony, or an act that would be a felony if committed by an adult, or the offense of battery.

Comment

This instruction is for use with Instruction No. 15.21B on Criminal Gang Enhancement.

(Text continued on page 14-43)

Instruction No. 14.42. Curtilage.

The term "curtilage" means the land, not necessarily fenced or enclosed, adjoining the dwelling house including buildings used in the conduct of family affairs and domestic purposes. In determining whether an area or building is within the "curtilage" of a dwelling house, two (2) factors are of principle importance:

1. its proximity to the dwelling, and
2. its use in connection with the dwelling for the purpose of conducting family affairs and domestic purposes.

Comments

This definition is drawn from *Fox v. State*, 179 Ind. App. 267, 384 N.E.2d 1159 (Ind. Ct. App., 1979).

Instruction No. 14.43. Custodian.

I.C. 35–42–4–7.

"Custodian" includes any person responsible for a child's welfare who is employed by a public or private residential school or foster care facility.

[Next Page is 14-47]

Comments

For use in child seduction prosecutions.

Instruction No. 14.45. Data.

I.C. 35–43–1–4.

The term "data" is defined by law as meaning a representation of information, facts, knowledge, concepts, or instructions that:

(1) may take any form, including computer printouts, magnetic storage media, punched cards, or stored memory;

(2) has been prepared or is being prepared; and

(3) has been processed, is being processed, or will be processed;

in a computer system or computer network.

Instruction No. 14.47. Deadly Force.

I.C. 35-41-1-7.

The term "deadly force" is defined by law as meaning force that creates a substantial risk of serious bodily injury.

Instruction No. 14.49. Deadly Weapon.

I.C. 35-41-1-8.

The term "deadly weapon" is defined by law as meaning:

[a loaded or unloaded firearm]

[or]

[a weapon, device, taser (as defined in I.C. 35-47-8-3) or electronic stun weapon (as defined in I.C. 35-47-8-1), equipment, chemical substance, or other material that in the manner it is used, or could ordinarily be used, is readily capable of causing serious bodily injury]

[or]

[an animal (as defined in I.C. 35-46-3-3) that is:

(A) readily capable of causing serious bodily injury

and

(B) used in the commission or attempted commission of a crime.]

Comments

The Committee recommends that, when instructing on one of the "deadly weapon" definitions above containing the term "serious bodily injury," Instruction No. 14.185 defining "serious bodily injury" be given as well. *See Kimbrough v. State*, 911 N.E.2d 621 (Ind. Ct. App. 2009) (jury could not properly determine whether a table leg was readily capable of causing serious bodily injury and hence was a "deadly weapon" when the court did not instruct on the definition of "serious bodily injury").

(Text continued on page 14-51)

Instruction No. 14.51. Delivery.

I.C. 35-48-1-11.

The term "delivery" means an actual or constructive transfer from one (1) person to another of a controlled substance, whether or not there is an agency relationship, or the organization or supervision of an actual or constructive transfer from one (1) person to another of a controlled substance, whether or not there is an agency relationship.

Instruction No. 14.53. Denied Entry.

I.C. 35–43–2–2(b).

A person has been denied entry to the real property of another person when he has been denied entry by means of a personal communication, oral or written, or by the posting or exhibiting of a notice at the main entrance in a manner that is either prescribed by law or likely to come to the attention of the public.

Instruction No. 14.55. Dependent.

I.C. 35–46–1–1.

The term "dependent" is defined by law as meaning:
[an unemancipated person who is under eighteen (18) years of age]
[or]
[a person of any age who is mentally or physically disabled.]

Instruction No. 14.56. Destructive Device

I.C. 35–47.5–2–4.

"Destructive device" means:

(1) an explosive, incendiary, or overpressure device that is configured as a [bomb] [grenade] [rocket with a propellant charge of more than four (4) ounces] [missile having an explosive or incendiary charge of more than one-quarter (1/4) ounce] [mine] [Molotov cocktail] [device that is substantially similar to a [*insert "bomb," "grenade," or other term in preceding list*]

(2) a type of weapon that may be readily converted to expel a projectile by the action of an explosive or other propellant through a barrel that has a bore diameter of more than one-half (1/2) inch

(3) a combination of parts designed or intended for use in the conversion of a device into a destructive device.

Comments

I.C. 35–47.5–2–4 contains a list of items which "are not included" in the definition above of "destructive device." The Committee believes that items on this list constitute "exceptions" or "exemptions" which the Defendant has the burden to prove. See *Harris v. State*, 716 N.E.2d 406 (Ind. 1999); *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001). The statutory list of exceptions is:

(1) A pistol, rifle, shotgun, or weapon suitable for sporting or personal safety purposes or ammunition.

(2) A device that is neither designed nor redesigned for use as a weapon.

(3) A device that, although originally designed for use as a weapon, is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device.

(4) A surplus military ordnance sold, loaned, or given by authority of the appropriate official of the United States Department of Defense.

It may be necessary to instruct on an exception if the evidence raises a dispute as to whether it is present.

Instruction No. 14.56A. Detonator.

I.C. 35–47.5–2–5.

"Detonator" means a device containing a detonating charge that is used to initiate detonation in an explosive, including the following:

(1) Electric blasting caps.
(2) Blasting caps for use with safety fuses.
(3) Detonating cord delay connectors.
(4) Blasting caps for use with a shock tube.
(5) Improvised devices designed to function as a detonator.

Instruction No. 14.57. Deviate Sexual Conduct.

I.C. 35–41–1–9.

The term "deviate sexual conduct" is defined by law as meaning an act involving:

[a sex organ of one person and the mouth or anus of another person]

[or]

[the penetration of the sex organ or anus of a person by an object.]

Instruction No. 14.59. Disadvantaged Business Enterprise.

I.C. 5–16–6.5–1, I.C. 4–13–16.5–1.

The term "disadvantaged business enterprise" is defined by law as meaning an individual, partnership, corporation, or joint venture of any kind that is owned and controlled by one or more persons who are United States citizens and members of a racial minority group.

Comments

The terms "owned and controlled" and "racial minority group" are defined by law. See I.C. 4–13–16.5–1; Instruction Nos. 14.145 and 14.171.

Instruction No. 14.60. Dispatched Firefighter.

I.C. 35–44–4–1.

"Dispatched firefighter" means a member of:

(1) the fire company having jurisdiction over an emergency incident area; or

(2) a fire company that has entered into a mutual aid agreement with the fire company having jurisdiction over an emergency incident area;

who has been dispatched by the local fire department having jurisdiction over the particular emergency incident area.

Instruction No. 14.61. Dispense.

I.C. 35–48–1–12.

The term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to, the lawful order of a practitioner and includes the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery.

Comments

The terms "administer," "controlled substance," "delivery," "practitioner" and "ultimate user" are defined by law. See I.C. 35–48–1–3, I.C. 35–48–1–9, I.C. 35–48–1–11, I.C. 35–48–1–24 and I.C. 35–48–1–27; Instruction Nos. 14.07, 14.31, 14.51, 14.157 and 14.207.

Instruction No. 14.63. Dispenser.

I.C. 35–48–1–13.

The term "dispenser" means a practitioner who dispenses.

Comments

The terms "dispense" and "practitioner" are defined by law. See I.C. 35–48–1–12 and I.C. 35–48–1–24; Instruction Nos. 14.61 and 14.157.

Instruction No. 14.65. Disseminate.

I.C. 35–42–4–4.

"Disseminate" means to transfer possession for free or for a consideration.

Instruction No. 14.67. Distribute.

I.C. 35–48–1–14.

The term "distribute" means to deliver other than by administering or dispensing a controlled substance.

Comments

This instruction is for use with controlled substance offenses. It should **not** be used for controlled explosives crimes.

The terms "administer," "dispense," and "controlled substance" are defined by law. See I.C. 35–48–1–3, I.C. 35–48–1–12, and I.C. 35–48–1–9; Instruction Nos. 14.07, 14.31, and 14.61.

Instruction No. 14.68. Distribute (Controlled Explosives Offenses).

I.C. 35–47.5–2–6.

"Distribute" means the actual, constructive, or attempted transfer from one(1) person to another.

Comments

This definition applies only to I.C. 35–47.5 controlled explosives offenses. It does **not** apply to controlled substances offenses, for which Instruction No. 14.67 should be used.

Instruction No. 14.69. Distributor.

I.C. 35–48–1–15.

The term "distributor" means a person who distributes.

Comments

The term "distribute" is defined by law. *See* I.C. 35–48–1–14; Instruction No. 14.67.

Instruction No. 14.69.7. Divest.

The term "divest" means to rid oneself of something, such as a business interest or investment.

Comment

This instruction is optional. It is for use with Instruction No. 5.06, Official Misconduct. The definition for "divest" here is not from statute. It is a dictionary definition which the Committee suggests may be helpful to jurors who may not have a clear understanding of "divest." The definition is from The New Oxford American Dictionary (2001). Other definitions, as agreed to by the parties, may be substituted.

Instruction No. 14.70. Domestic Animal.

I.C. 35-46-3-12(d).

The term "domestic animal" means an animal that is not wild. The term is limited to:

[cattle]

[calves]

[horses]

[mules]

[swine]

[sheep]

[goats]

[dogs]

[cats]

[poultry]

[ostriches]

[rhea]

[emus]

and

an animal of the

[bovine]

[equine]

[ovine]

[caprine]

[porcine]

[canine]

[feline]

[camelid]

[cervidae]

[bison]

species.

Comments

This instruction is for use in prosecutions for killing a domestic animal, Instruction No. 7.525.

Instruction No. 14.71. Drug.

I.C. 35–48–1–16, I.C. 16–6–8–2.

The term "drug" means:

(1) articles or substances recognized in United States Pharmocopeial Convention, Inc., The United States Pharmacopoeia, Twenty-second Edition (1990), or United States Pharmocopeial Convention, Inc., The National Formulary, Seventeenth Edition (1990), as revised by United States Pharmocopeial Convention, Inc., Supplement 1 to The United States Pharmaocpoeia, Twenty-second Edition, and the National Formulary, Seventeenth Edition (1990);

(2) articles or substances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in human beings or other animals;

(3) articles other than food intended to affect the structure or any function of the body of human beings or other animals;

(4) articles intended for use as a component of any article specified above in (1), (2), or (3); and

(5) devices.

(Text continued on page 14-73)

Instruction No. 14.73. Drug Abuser.

I.C. 35–47–1–4.

The term "drug abuser" means an individual who has had two (2) or more violations of I.C. 35–48–1, I.C. 35–48–2, I.C. 35–48–3 or I.C. 35–48–4, any one of which resulted in conviction by a court or treatment in a drug abuse facility within five (5) years prior to the date of application.

For use only with Chapter 7 — Firearms Offense Instructions.

Instruction No. 14.75. Dwelling.

I.C. 35–41–1–10.

The term "dwelling" is defined by law as meaning a building, structure, or other enclosed space, permanent or temporary, movable or fixed, that is a person's home or place of lodging.

Instruction No. 14.76. Emergency Incident Area.

I.C. 35–44–4–2.

"Emergency incident area" means the area surrounding a structure, vehicle, property, or area that is:

(1) defined by police or firefighters with flags, barricades, barrier tape, or other markers; or

(2) one hundred and fifty (150) feet in all directions from the perimeter of the emergency incident;

whichever is greater.

Instruction No. 14.76a. Emergency Medical Services Provider.

I.C. 16–41–10–1; I.C. I.C. 35–46–1–4(c)(1);

I.C. 31–9–34–2.5–1; I.C. 31–9–2–43.5.

The term "emergency medical services provider" is defined by law as a [firefighter] [law enforcement officer] [paramedic] [emergency medical technician] [other person who provides emergency medical services in the course of the person's employment].

Instruction 14.77. Endangered Adult -Offenses other than Battery

I.C. 12-10-3-2. (For Battery use Instruction 14.77a).

"Endangered adult" means an individual who is

- at least eighteen (18) years of age
- and incapable by reason of mental illness, mental retardation, dementia, habitual drunkenness, excessive use of drugs, or other physical or mental incapacity of managing or directing the management of [his] [her] property or providing or directing the provision of self-care;
- and is harmed or threatened with harm as a result of neglect, battery, or exploitation of [his] [her] services or property.

Instruction 14.77a. Endangered Adult -Battery.

I.C. 12-10-3-2.

"Endangered adult" means an individual who is

- at least eighteen (18) years of age
- and
- incapable by reason of mental illness, mental retardation, dementia, or other physical or mental incapacity of
  - [managing or directing the management of (his) (her) property]
  - or
  - [providing or directing the provision of self-care.]
- and
- harmed or threatened with harm as a result of [neglect] [battery].

Comment

This instruction is for use only with the offenses of battery, I.C. 35-42-2-1, or failure to report battery, I.C. 35-46-1-13.

Instruction No. 14.79. Enterprise.

I.C. 35-45-6-1.

The term "enterprise" is defined by law as meaning a sole proprietorship, corporation, partnership, business trust, or governmental entity; or a union, association, or group, whether a legal entity or merely associated in fact.

Instruction No. 14.79.5. Entrapment and Entrapped.

I.C. 9-13-2-49.7.

The term "entrapment" is defined by law as a confining circumstance from which escape or relief is difficult or impossible. A person is "entrapped" if he or she is in a confining circumstance from which escape or relief is difficult or impossible.

Comments

For use with failure to act as required after accident involving bodily injury, Instruction No. 7.101.

(Text continued on page 14-81)

Instruction No. 14.81. Exert Control Over Property.

I.C. 35–43–4–1(a).

The term "exert control over property" is defined by law as meaning to obtain, take, carry, drive, lead away, conceal, abandon, sell, convey, encumber, or possess property, or to secure, transfer, or extend a right to property.

Instruction No. 14.82. Explosives.

I.C. 35–47.5–2–7.

"Explosives" means a chemical compound or other substance or mechanical system intended to produce an explosion capable of causing injury to persons or damage to property or containing oxidizing and combustible units or other ingredients in such proportions or quantities that ignition, fire, friction, concussion, percussion, or detonation may produce an explosion capable of causing injury to persons or damage to property, including the substances designated in IC 35–47.5–3.

Comments

This definition applies only to I.C. 35–47.5 controlled explosives offenses.

I.C. 35–47.5–2–7 contains a list of items which the definition above of "explosives" does not include." The Committee believes that items on this list constitute "exceptions" or "exemptions" which the Defendant has the burden to prove. See *Harris v. State*, 716 N.E.2d 406 (Ind. 1999); *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001). The statutory list of exceptions is:

(1) A model rocket and model rocket engine designed, sold, and used to propel recoverable aero models.

(2) A paper cap in which the explosive content does not average more than twenty-five hundredths (0.25) grains of explosive mixture per paper cap for toy pistols, toy cannons, toy canes, toy guns, or other devices using paper caps unless the paper cap is used as a component of a destructive device.

Instruction No. 14.83. Fair Market Value of Home Improvement.

I.C. 35–43–6–10, I.C. 35–43–6–11.

The fair market value of a home improvement is that amount which in commercial judgment or under usage of trade would be reasonable for services, materials, and work for similar quality and workmanship.

Fair market value shall be determined as of the time either the home improvement contract was formed or the time any of the work commenced under the home improvement contract, whichever is earlier.

[However, if such evidence is not readily available, the fair market value prevailing within any reasonable time before or after the time described, which in commercial judgment or under usage of trade would service as a reasonable substitute, may be used.]

Comments

The terms "home improvement" and "home improvement contract" are defined by law. *See* I.C. 35-43-6-3 and I.C. 35-43-6-4; Instruction Nos. 14.107 and 14.109.

Instruction No. 14.83a. Family Housing Complex.

I.C. 35-41-1-10.5.

The term "family housing complex" means a building or series of buildings:
[that contains at least twelve (12) dwelling units
where children are domiciled or are likely to be domiciled; and
that are owned by a governmental unit or political subdivision]
[that is operated as a hotel or motel (*as described in I.C. 22-11-18-1*)]
[that is operated as an apartment complex (*as defined in I.C. 6-1.1-20.6-1*)]
[that contains subsidized housing].

Instruction No. 14.83b. Family or Household Member.

I.C. 35-31.5-2-128.

An individual is a "family or household member" of another person if the individual:

(1) is a current or former spouse of the other person;

(2) is dating or has dated the other person;

(3) is or was engaged in a sexual relationship with the other person;

(4) is related by blood or adoption to the other person;

(5) is or was related by marriage to the other person;

(6) has or previously had an established legal relationship:

(A) as a guardian of the other person;

(B) as a ward of the other person;

(C) as a custodian of the other person;

(D) as a foster parent of the other person; or

(E) in a capacity with respect to the other person similar to those listed in clauses (A) through (D); or

(7) has a child in common with the other person.

(b) An individual is a "family or household member" of both persons to whom subsection (a)(1), (a)(2), (a)(3), (a)(4), (a)(5), (a)(6), or (a)(7) applies if the individual is a minor child of one (1) of the persons.

Comment

Subsection (5)'s "related by marriage" was construed in *Suggs v. State*, 51 N.E.3d 1190 (Ind. 2016) as limited by the common-law doctrine of relationship by affinity:

> "Related by marriage" is commonly referred to as affinity, which is defined as "the connection existing in consequence of marriage between each of the married persons and the kindred of the other. . . .
>
> . . . "[t]here is no affinity between the blood relatives of one spouse and the blood relatives of the other. A husband is related by affinity to his wife's brother, but not to the wife of his wife's brother. There is no affinity between the husband's brother and the wife's sister." 2 Charles E. Torcia, Wharton's Criminal Law § 242 at 573 (15th ed. 1994) (footnotes omitted).
>
> It appears to us that rather than extending the scope of "related by marriage" to an infinite configuration of marital relationships the legislature intended instead to employ the term in its commonly understood meaning namely, related by "affinity." . . . "There is no affinity between the blood relatives of one spouse

and the blood relatives of the other." 2 Wharton's Criminal Law § 242 at 573.

(Text continued on page 14-87)

Instruction No. 14.84. Federal Enforcement Officer.

I.C. 35-41-1-17.

The term "federal enforcement officer" is defined by law as meaning any of the following:

(1) a Federal Bureau of Investigation special agent;

(2) a United States Marshals Service marshall or deputy;

(3) a United States Secret Service special agent;

(4) a United States Fish and Wildlife Service special agent;

(5) a United States Drug Enforcement Agency agent;

(6) a Bureau of Alcohol, Tobacco, and Firearms agent;

(7) a United States Department of Defense police officer or criminal investigator;

(8) a United States Customs Service agent;

(9) a United States Postal Service investigator.

Instruction No. 14.84.5. Federal Public Benefit.

I.C. 12-32-1-2.

The term "federal public benefit" means:

(1) Except as provided in paragraph (2), "Federal public benefit" means—

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.

(2) Such term shall not apply—

(A) to any contract, professional license, or commercial license for a nonimmigrant whose visa for entry is related to such employment in the United States, or to a citizen of a freely associated state, if section 141 of the applicable compact of free association approved in Public Law 99-239 or 99-658 (or a successor provision) is in effect;

(B) with respect to benefits for an alien who as a work authorized nonimmigrant or as an alien lawfully admitted for permanent residence under the Immigration and Nationality Act qualified for such benefits and for whom the United States under reciprocal treaty agreements is required to pay benefits, as determined by the Attorney General, after consultation with the Secretary of State; or

(C) to the issuance of a professional license to, or the renewal of a professional license by, a foreign national not physically present in the United States.

Comments

For use in prosecutions of false verification of citizenship or immigration status, Instruction No. 5.53.

This definition incorporates 8 U.S.C. 1611.

Instruction No. 14.85. Felony Conviction.

I.C. 35–50–2–1.

The term "felony conviction" is defined by law as meaning a conviction, in any jurisdiction, at any time, with respect to which the convicted person might have been imprisoned for more than one (1) year; but it does not include a conviction with respect to which the person has been pardoned, or the commission of a Class D felony, the judgment of conviction for which is entered as a Class A misdemeanor under I.C. 35–50–2–7(b).

(Text continued on page 14-89)

Instruction No. 14.86. Fear.

The word "fear" means an emotional state of mind created by anticipation of bodily injury.

Comments

This instruction is based on *Rigsby v. State*, 582 N.E.2d 910 (Ind. Ct. App. 1991).

Instruction No. 14.86.05. Fetus.

I.C. 35-42-1-4, 16-18-2-365.

The term "fetus" means a fetus which has attained the ability to live outside the mother's womb.

Comment

This instruction is for use only with Instruction 3.09 on involuntary manslaughter. The involuntary manslaughter statute, I.C. 35-42-1-4(b), provides that "[a]s used in this section, 'fetus' means a fetus that has attained viability (as defined in IC 16-18-2-365)." I.C. 16-18-2-365 provides that "[v]iability," for purposes of IC 16-34, means the ability of a fetus to live outside the mother's womb."

(Text continued on page 14-91)

Instruction No. 14.86a. Financial Institution.

I.C. 35–43–5–12(a).

The term "financial institution" means a state or federally chartered bank, a savings bank, a building and loan association, a savings association, or a credit union.

Instruction No. 14.87. Firearm.

I.C. 35–47–1–5.

The word "firearm" means any weapon that is capable of or designed to or that may readily be converted to expel a projectile by means of an explosion.

Comments

For use with Chapter 7 — Firearms Offense Instructions.

Instruction No. 14.88. Firefighter.

I.C. 35-44-4-3.

"Firefighter" means a person who is:

(1) a full-time, salaried firefighter; or

(2) a volunteer firefighter (as defined in I.C. 36-8-12-2).

Alternative for battery by body waste prosecutions:

Instruction No. 14.88. Firefighter.

I.C. 35-42-2-6.

"Firefighter" means a person who is a:

[full-time, salaried firefighter]

or

[part-time, paid firefighter]

or

[volunteer firefighter (as defined in IC 36-8-12-2)].

Comment

The first instruction is for use with Instruction No. 5.45 on the IC 34-44-4-7 offense of impersonating a firefighter. The second instruction is for use with Instruction No. 3.13a on battery by bodily waste.

Instruction No. 14.88a. Fire Protective Clothing and Fire Protective Gear.

I.C. 35–44–4–4.

"Fire protective clothing and fire protective gear" includes any of the following items generally used by firefighters:

(1) Outer fire retardant clothing and headgear.

(2) Fire gloves.

(3) Selfcontained breathing apparatus.

(4) Emergency medical services protective gear.

(5) Hazardous materials protective gear.

Instruction No. 14.88d. First Responder.

I.C. 35-42-2-6.

"First responder" means a person who

(1) is certified under IC 16-31, and

(2) meets the Indiana emergency medical services commission's standards for responder certification, and

(3) responds to an incident requiring emergency medical services.

Comment

This instruction is for use with Instruction No. 3.13a on battery by bodily waste.

Instruction No. 14.89. Forcible Felony.

I.C. 35–41–1–11.

The term "forcible felony" is defined by law as meaning a felony that involves the use or threat of force against a human being, or in which there is an imminent danger of bodily injury to a human being.

(Text continued on page 14-97)

Instruction No. 14.90. Funds.

I.C. 35–45–15–2.

As used in the definition of the money laundering crime, the term "funds" is defined by law as including the following:

(1) Coin or paper money of the United States or any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issue.

(2) United States silver certificates, United States Treasury notes, and Federal Reserve System notes.

(3) Official foreign bank notes that are customarily used and accepted as a medium of exchange in a foreign country.

(4) Foreign bank drafts.

Comments

This instruction is meant for use in prosecutions of the money laundering crime, I.C. 35–45–15–5, Instructions Nos. 6.24 and 6.24a.

Instruction No. 14.91. Gain.

I.C. 35–45–5–1.

The term "gain" is defined by law as meaning the direct realization of winnings.

Instruction No. 14.93. Gambling.

I.C. 35–45–5–1.

The term "gambling" is defined by law as meaning risking money or other property for gain, contingent in whole or in part upon lot, chance, or the operation of a gambling device; but it does not include participating in:

1. bona fide contests of skill, strength, or endurance in which awards are made only to entrants or the owners of entries; or
2. bona fide business transactions that are valid under the law of contracts.

Instruction No. 14.95. Gambling Device.

I.C. 35–45–5–1.

The term "gambling device" is defined by law as meaning:

1. a mechanism by the operation of which a right to money or other property may be credited, in return for consideration, as the result of the operation of an element of chance;
2. a mechanism that, when operated for a consideration, does not return the same value or property for the same consideration upon each operation;
3. a mechanism, furniture, fixture, construction, or installation designed primarily for use in connection with professional gambling;
4. a policy ticket or wheel; or
5. a subassembly or essential part designed or intended for use in connection with such a device, mechanism, furniture, fixture, construction, or installation.

In the application of this definition, an immediate and unrecorded right to replay mechanically conferred on players of pinball machines and similar amusement devices is presumed to be without value.

Instruction No. 14.97. Gambling Information.

I.C. 35–45–5–1.

The term "gambling information" is defined by law as meaning:

1. a communication with respect to a wager made in the course of professional gambling; or
2. information intended to be used for professional gambling.

Instruction No. 14.99. Governmental Entity.

I.C. 35–41–1–12.

The term "governmental entity" is defined by law as meaning:

a. the United States or any state, county, township, city, town, separate municipal corporation, special taxing district, or public school corporation;

b. any authority, board, bureau, commission, committee, department, division, hospital, military body, or other instrumentality of any of those entities; or

c. a state-assisted college or state-assisted university.

Instruction No. 14.100. HIV.

I.C. 35–42–2–6.

The term "HIV" (human immunodeficiency virus) includes acquired immune deficiency syndrome (AIDS) and AIDS related complex.

Instruction No. 14.101. Handgun.

I.C. 35–47–1–6.

The word "handgun" means any firearm:

(1) designed or adapted so as to be aimed and fired from one (1) hand, regardless of barrel length; or

(2) any firearm with:

(a) a barrel less than sixteen (16) inches in length; or

(b) an overall length of less than twenty-six (26) inches.

Comments

For use with Chapter 7—Firearms Offense Instructions.

Instruction No. 14.102. Harbor.

The term "harbor" means to shelter or protect.

Comment

This instruction is optional. It is for use with Instruction No. 5.06, Official Misconduct. The definition for "harbor" here is not from statute. It is a definition which the Committee suggests may be helpful to jurors who may not have a clear understanding of "harbor." The definition is based on a definition from The New Oxford American Dictionary (2001). Other definitions, as agreed to by the parties, may be substituted.

Some jurisdictions have pattern instructions defining "harbor" or similar terms as used in their law. The court and parties may wish to consult the following patterns:

- CALIFORNIA

  Black's Law Dictionary defines harbor as "[t]he act of affording lodging, shelter, or refuge to a person, esp. a criminal or illegal alien." (7th ed., 1999,at p. 721.) The court may wish to give an additional definition depending on the facts of the case. 1-400 CALCRIM 440.

- ALASKA

  Alaska Criminal Pattern Jury Instruction 11.56.770 [A person "renders assistance" to another if the person [harbors or conceals that person] [warns that person of impending discovery or apprehension] [provides or aids in providing that person with money, transportation, a dangerous instrument, a disguise, or other means of avoiding discovery or apprehension] [prevents or obstructs, by means of force, threat, or deception, anyone from performing an act which might aid in the discovery or apprehension of that person] [suppresses, by an act of concealment, alteration, or destruction, physical evidence which might aid in the discovery or apprehension of that person] [aids that person in securing or protecting the proceeds of the crime].]

- TENNESSEE

  "Harbor" means to afford lodging to; to shelter, or to give refuge to; to receive without lawful authority a person for the purpose of so concealing [*him*] [*her*] that another having a right to the lawful custody of such person shall be deprived of the same. Black's Law Dictionary (5th Ed. 1979). 1-40 T.P.I. Criminal 40.15 Tennessee Criminal Jury Instructions.

- VERMONT Vermont—VT Criminal Jury Instructions § 1-10-441

  § 441 "harbor" CR10-441 Definition of "harbor" (context of unlawful restraint)

  [To harbor a person means to improperly conceal the person from that person's lawful custodian.]

[To harbor a person means to help or assist the person to hide from that person's lawful custodian.]

(Text continued on page 14-107)

Instruction No. 14.103. Harm.

I.C. 35–41–1–13.

The term "harm" is defined by law as meaning loss, disadvantage, or injury or anything so regarded by the person affected, including loss, disadvantage, or injury to any other person in whose welfare the person is interested.

Instruction No. 14.104. Harrassment.

I.C. 35–45–10–2.

The term "harrassment" is defined by law as meaning conduct directed toward a victim that includes but is not limited to repeated or continuing impermissible contact that would cause a reasonable person to suffer emotional distress and that actually causes the victim to suffer emotion distress. Harassment does not include statutorily or constitutionally protected activity, such as lawful picketing pursuant to labor disputes or lawful employer-related activities pursuant to labor disputes.

Comments

The terms "impermissible contact" and "victim" used in this definition of harrassment are defined by law. See I.C. 35–45–10–3 and -4; Instruction Nos. 14.116 and 14.215.

Instruction No. 14.105. Hazing.

I.C. 35–42–2–2.

"Hazing" means forcing or requiring another person, with or without that person's consent, and as a condition of association with a group or organization, to perform an act that creates a substantial risk of bodily injury.

Comments

This instruction is for use with Instruction No. 3.15 when criminal recklessness is alleged to have been committed by hazing.

Instruction No. 14.106. Health Care Provider.

I.C. 35–42–3–8(a).

The term "health care provider" is defined by law as [*insert pertinent "health care provider" definition from I.C. 16–18–2–163*] or [*for interference with medical services only, in addition to preceding "health care provider" definition, insert "qualified medication aide" "as described in I.C. 16–28–1–11"*].

Instruction No. 14.106A. Hoax Device or Replica.

I.C. 35–47.5–2–8.

"Hoax device" or "replica" means a device or article that has the appearance of a destructive device or detonator.

Comments

This instruction is for use with I.C. 35–47.5 controlled explosives offenses.

The terms "destructive device" and "detonator" are defined by statute. See Instructions 14.56 and 14.56A; I.C. 35–47.5–2–4 and 35–47.5–2–5.

Instruction No. 14.107. Home Improvement.

I.C. 35-43-6-3.

The term "home improvement" means any alteration, repair, or other modification of residential property. The term does not include the original construction of a dwelling.

Instruction No. 14.109. Home Improvement Contract.

I.C. 35–43–6–4.

The term "home improvement contract" means an oral or written agreement between a home improvement supplier and a consumer to make a home improvement and for which the contract price exceeds one hundred fifty dollars ($150). Multiple contracts entered into by a home improvement supplier with a consumer are considered a home improvement contract for the purposes of this chapter if the multiple contracts arise from the same transaction.

Comments

The terms "consumer," "home improvement" and "home improvement supplier" are defined by law. See I.C. 35–43–6–2, I.C. 35–43–6–3 and I.C. 35–43–6–6; Instruction Nos. 14.27, 14.107 and 14.113.

Instruction No. 14.111. Home Improvement Contract Price.

I.C. 35-43-6-5.

The term "home improvement contract price" means the amount actually charged for the services, materials, and work to be performed under the home improvement contract but does not include financing costs, loan consolidation amounts, taxes, and governmental fees paid by or on behalf of the consumer, amounts returned to or on behalf of the consumer or similar costs not related to the home improvement.

Comments

The terms "consumer," "home improvement" and "home improvement contract" are defined by law. See I.C. 35–43–6–2, I.C. 35–43–6–3 and I.C. 35–43–6–4; Instruction Nos. 14.27, 14.107 and 14.109.

Instruction No. 14.113. Home Improvement Supplier.

I.C. 35–43–6–6.

The term "home improvement supplier" means a person who engages in or solicits home improvement contracts whether or not the person deals directly with the consumer.

Comments

The terms "consumer," "home improvement contract" and "person" are defined by law. See I.C. 35–43–6–2, I.C. 35–43–6–4 and I.C. 35–43–6–7; Instruction Nos. 14.27, 14.109 and 14.155.

Instruction No. 14.115 Human Being.

I.C. 35–41–1–14.

The term "human being" is defined by law as meaning an individual who has been born and is alive.

Instruction No. 14.116. Impermissible Contact.

I.C. 35–45–19–3.

The term "impermissible contact" is defined by law as including but not limited to knowingly or intentionally following or pursuing the victim.

Instruction No. 14.117. Imprison.

I.C. 35–41–1–15.

The term "imprison" is defined by law as meaning to confine in a penal facility or to commit to the Department of Correction.

Instruction No. 14.117.1. Incendiary.

I.C. 35-47.5-2-9.

"Incendiary" means a flammable liquid or compound with a flash point not greater than one hundred fifty (150) degrees Fahrenheit, as determined by a Tagliabue or an equivalent closed cup device, including gasoline, kerosene, fuel oil, or a derivative of these substances.

Comments

This instruction is for use with I.C. 35-47.5 controlled explosives offenses.

Instr. No. 14.117.2. Identifying Information.

I.C. 35-43-5-1.

The term "identifying information" is defined by law as meaning information that identifies an individual, including an individual's:

(1) name, address, date of birth, place of employment, employer identification number, mother's maiden name, Social Security number, or any identification number issued by a governmental entity;

(2) unique biometric data, including the individual's fingerprint, voice print, or retina or iris image;

(3) unique electronic identification number, address, or routing code;

(4) telecommunication identifying information; or

(5) telecommunication access device, including a card, a plate, a code, a telephone number, an account number, a personal identification number, an electronic serial number, a mobile identification number, or another telecommunications service or device or means of account access that may be used to:

(A) obtain money, goods, services, or any other thing of value; or

(B) initiate a transfer of funds.

Instruction No. 14.117.2a. Instant Messaging or Chat Room Program.

I.C. 35-42-4-12(c).

The term "instant messaging or chat room program" means a software program that:

- requires a person to register or create (an account) (a username) (a password) to become a member or registered user of the program
- and allows two (2) or more members or authorized users to communicate over the Internet in real time.

The term does not include an electronic mail program or message board program.

Comments

For use in I.C. 35-42-4-12 sex offender Internet offense prosecutions.

Instruction No. 14.117.3. Insurance Policy.

I.C. 35-43-5-1.

The term "insurance policy" as defined by law includes includes

[an insurance policy]

[or]

[a contract with a health maintenance organization (as defined in IC 27-13-1-19) or a limited service health maintenance organization (as defined in IC 27-13-1-27)]

[or]

[a written agreement entered into under IC 27-1-25].

Instruction No. 14.117.4. Insurer.

I.C. 35-43-5-1.

The term "insurer" is defined by law as meaning:

[a company, firm, partnership, association, order, society or system making any kind or kinds of insurance and includes associations operating as Lloyds, reciprocal or inter-insurers, or individual underwriters]

[or]

[a reinsurer]

[or]

[a purported insurer or reinsurer]

[or]

[a broker]

[or]

[an agent of an insurer, a reinsurer, a purported insurer or reinsurer, or a broker]

[or]

[a health maintenance organization]

[or]

[a limited service health maintenance organization].

Instruction No. 14.118. Intoxicated.

I.C. 9-13-2-86.

"Intoxicated" means under the influence of [alcohol] [a controlled substance][any drug other than alcohol or a controlled substance] [model glue] [a substance that contains (toluene)(acetone) (benzene) (N-butyl nitrite) (any aliphatic nitrite, unless prescribed by a physician) (butane) (amyl butrate) (isobutyl nitrate) (freon) (chlorinated hydrocarbon) (methylene chloride) (hexane) (ether) (chloroform)(halothane) (nitrous oxide)] [any other chemical having the property of releasing toxic vapors] [any combination of the preceding substances] [any other substance, not including food and food ingredients (as defined in IC 6-2.5-1-20), tobacco (as defined in IC 6-2.5-1-28), or a dietary supplement (as defined in IC 6-2.5-1-16)] so that there is an impaired condition of thought and action and the loss of normal control of a person's faculties.

Comments

For purposes of this definition, "drug" includes (legend drug [as defined in IC 16-18-2-199]) (nitrous oxide) ("model glue" [as defined in IC 35-46-6-1]) (any substance listed in IC 35-46-6-2(2)).

Instruction No. 14.119. Items of Drug Paraphernalia as Described in I.C. 35-48-4-8.5.

I.C. 35-48-4-8.5.

The term "items of drug paraphernalia as described in I.C. 35-48-5-8.5" means a raw material, instrument, device, or other object that is intended to be or that is designed or marketed to be used primarily for:

(1) ingesting, inhaling, or otherwise introducing into the human body marijuana, hash oil, hashish, or a controlled substance; or

(2) testing the strength, effectiveness, or purity of marijuana, hash oil, hashish, or a controlled substance; or

(3) enhancing the effect of a controlled substance; or

(4) manufacturing, compounding, converting, producing, processing or preparing marijuana, hash oil, hashish, or a controlled substance; or

(5) diluting or adulterating marijuana, hash oil, hashish, or a controlled substance by individuals; or

(6) any purpose announced or described by the seller that is in violation of I.C. 35-48-4, the Indiana Code Chapter defining controlled substance offenses.

Instruction No. 14.119.2. Juvenile Facility.

I.C. 35-44.1-3-5.

The term "juvenile facility" means:

(1) A secure facility (as defined in IC 31-9-2-114) in which a child is detained or which is used for a child awaiting adjudication or adjudicated as a child in need of services or a delinquent child.

[or]

(2) A shelter care facility (as defined in IC 31-9-2-117) in which a child is detained or used for a child awaiting adjudication or adjudicated as a child in need of services or a delinquent child.

Comments

This instruction is for use with Instruction No. 5.42.5, possessing a deadly weapon in a [penal] [juvenile] facility.

Instruction No. 14.119.3. Key Facility.

I.C. 35-41-1-16.5.

The term "key facility" means:

[A chemical manufacturing facility]

[or]

[A refinery]

[or]

[An electric utility facility, including:

(a power plant)

(or)

(a power generation facility peaker)

(or)

(an electric transmission facility)

(or)

(an electric station or substation)

(or)

(any other facility used to support the generation, transmission, or distribution of electricity)]

[or]

[A water intake structure or water treatment facility]

[or]

[A natural gas utility facility, including:

(an age station)

(or)

(a compressor station)

(or)

(an odorization facility)

(or)

(a main line valve)

(or)

(a natural gas storage facility)

(or)

(any other facility used to support the acquisition, transmission, distribution, or storage of natural gas)]

[or]

(Text continued on page 14-133)

[A gasoline, propane, liquid natural gas (LNG), or other fuel terminal or storage facility]

[or]

[A transportation facility, including, but not limited to, a

port, railroad switching yard, or trucking terminal]

[or]

[A pulp or paper manufacturing facility]

[or]

[A pharmaceutical manufacturing facility]

[or]

[A hazardous waste storage, treatment, or disposal

facility]

[or]

[A telecommunications facility, including a central office

or cellular telephone tower site].

Comments

The "electric utility facility" definition above has the following statutory exclusion:

However, the term does not include electric transmission land or right-of-way that is not completely enclosed, posted, and maintained by the electric utility.

The "natural gas utility facility" definition above has the following statutory exclusion:

However, the term does not include gas transmission pipeline property that is not completely enclosed, posted, and maintained by the natural gas utility.

The "transportation facility" definition above has the following statutory exclusion:

However,the term does not include a railroad track that is not part of a railroad switching yard.

Instr. No. 14.119.5. Knife.

IC 35-47-5-2.5.

The term "knife" means an instrument that (1) consists of a sharp edged or sharp pointed blade capable of inflicting cutting, stabbing, or tearing wounds and (2) is intended to be used as a weapon. The term includes a dagger, dirk, poniard, stiletto, switchblade knife, or gravity knife.

Comments

This definition is for use only with the crime of possession of a knife at school, Instruction 7.89.

Instruction No. 14.121. Labeling.

I.C. 35-45-8-2.

I.C. 16-1-28-3.

The term "labeling" means all labels and other written, printed, or graphic matter upon any article or any of its containers or wrappers or accompanying such article.

Instruction No. 14.122. Law Enforcement Animal.

I.C. 35-46-3-4.5.

The term "law enforcement animal" means an animal that is owned or used by a law enforcement agency for the principal purposes of (1) aiding in the detection of criminal activity, the enforcement of laws, and the apprehension of offenders and (2) ensuring the public welfare. The term includes, but is not limited, to the following: (a horse) (an arson investigation dog) (a bomb detection dog) (a narcotic detection dog) (a patrol dog).

Instruction No. 14.123. Law Enforcement Officer.

I.C. 35-41-1-17(a).

The term "law enforcement officer" is defined by law as meaning:

1. a police officer, sheriff, constable, marshal, or prosecuting attorney;
2. a deputy of any of those persons;
3. an investigator for a prosecuting attorney; or
4. a conservation officer.

Instruction No. 14.125. Lawful Detention.

I.C. 35-41-1-18.

The term "lawful detention" is defined by law as meaning: arrest, custody following surrender in lieu of arrest, detention in a penal facility, detention in a facility for custody of persons alleged or found to be delinquent children, detention under a law authorizing civil commitment in lieu of criminal proceedings or authorizing such detention while criminal proceedings are held in abeyance, detention for extradition or deportation, placement in a community corrections program's residential facility or electronic monitoring, or custody for purposes incident to any of the above including transportation, medical diagnosis or treatment, court appearances, work or recreation, or any other detention for law enforcement purposes; but it does not include supervision of a person on probation or parole except as provided for community corrections residential facililties or electronic monitoring, or constraint incidental to release with or without bail.

Instruction No. 14.125a. Licensed Health Care Professional.

I.C. 35-42-2-8.

The term "licensed health care professional" means:

[a registered nurse]

[a licensed practical nurse]

[a physician with an unlimited license to practice medicine or osteopathic medicine]

[a licensed dentist]

[a licensed chiropractor]

[a licensed optometrist]

[a licensed pharmacist]

[a licensed physical therapist]

[a licensed psychologist]

[a licensed podiatrist]

[a licensed speech-language pathologist or audiologist].

Instruction No. 14.126. Machine Gun.

I.C. 35-41-1-18.3.

The term "machine gun" means a weapon that shoots, or can readily be restored to shoot, automatically more than one (1) shot, without manual reloading, by a single function of the trigger.

Instruction No. 14.127. Make.

I.C. 35-43-5-1.

"Make" means to draw, prepare, complete, counterfeit, copy or otherwise reproduce, or alter any written instrument in whole or in part.

Instruction No. 14.129. Manufacture.

I.C. 35-48-1-18.

The term "manufacture" means: (1) the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container, or (2) the organizing or supervision of any such production, preparation, propagation, compounding, conversion, or processing of a controlled substance.

"Manufacture" does not include the preparation, compounding, packaging, or labeling of a controlled substance:

(a) by a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice; or

(b) by a practitioner, or by his authorized agent under his supervision, for the purpose of, or as an incident to, research teaching or chemical analysis and not for sale.

Instruction No. 14.130. Manufacture of an Unlawful Telecommunications Device.

I.C. 35-45-13-1.

The term "manufacture of an unlawful telecommunications device" means:

(1) the production or assembly of an unlawful telecommunications device; or

(2) the modification, alteration, programming, or reprogramming of a telecommunications device to render it capable of acquiring or facilitating the acquisition of telecommunications service without the consent of the telecommunications service provider.

Comments

The terms "telecommunications device," "telecommunications services," "telecommunications service provider," and "unlawful telecommunications device" are defined by law. *See* I.C. 35-45-13-3, I.C. 35-45-13-4, I.C. 35-45-13-5, and I.C. 35-45-13-6; Instruction Nos.14.202, 14.202a, 14.202b, and 14.214.

Instruction No. 14.131. Marijuana.

I.C. 35-48-1-19.

The term "marijuana" means any part of the plant genus Cannabis whether growing or not; the seeds thereof; the resin extracted from any part of the plant, including hashish and hash oil; any compound, manufacture, salt derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom); or the sterilized seed of the plant which is incapable of germination.

Instruction No. 14.133. Matter.

I.C. 35-49-1-3.

"Matter" means any book, magazine, newspaper, or other printed or written material; any picture, drawing, photograph, motion picture, or other pictorial representation; any statue or other figure; any recording, transcription, or mechanical, chemical, or electric reproduction; or any other articles, equipment, machines, or materials.

Instruction No. 14.133.2. Mental Health Professional.

I.C. 35-42-4-7.

"Mental health professional" means:

(1) a mental health counselor licensed under IC 25-23.6-8.5;

(2) a psychologist; or

(3) a psychiatrist.

Comments

This instruction is for use with Instructions No. 3.45.1, Child Seduction—Professional Relationship, and No. 14.162, Professional Relationship.

Instruction No. 14.133.5. Military Recruiter.

I.C. 35-42-4-7.

The term "military recruiter" means a member of the armed forces of the United States (as defined in IC 20-33-10-2) or the Indiana National Guard whose primary job function, classification, or specialty is recruiting individuals to enlist with the armed forces of the United States or the Indiana National Guard.

Comments

For use in I.C. 35-42-4-7 child seduction prosecutions, Instruction No. 3.45.

Instruction No. 14.134. Minor.

I.C. 7.1-1-3-25.

The term "minor" means a person less than twenty-one (21) years of age.

Comments

For use in I.C. 7.1-5-7-8 prosecutions for furnishing an alcoholic beverage to a minor.

Instruction No. 14.135. Model Glue.

I.C. 16-6-8.9-1(b).

The term "model glue" means a glue or cement containing: (1) toluene or acetone or both, or (2) another chemical having the property of releasing toxic vapors.

(Text continued on page 14-146.3)

Instruction No. 14.137. Motor Vehicle.

I.C. 9-13-2-105.

The term "motor vehicle" is defined by law as meaning a vehicle that is self-propelled. [The term does not include a "farm tractor," "implement of husbandry," or "an electric personal assistive mobility device."]

Instruction No. 14.138. Mutilate.

I.C. 35-46-3-0.5.

The term "mutilate" means to wound, injure, maim, or disfigure an animal by irreparably damaging the animal's body parts or to render any part of the animal's body useless. The term includes bodily injury involving [serious permanent disfigurement] [serious temporary disfigurement] [permanent or protracted loss or impairment of the function of a bodily part or organ] [a fracture].

Instruction No. 14.139. Narcotic Drug.

I.C. 35-48-1-20.

The term "narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate;

(2) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical to any of the substances referred to in subdivision (1) of this definition, but not including the isoquinoline alkaloids of opium;

(3) Opium poppy and poppy straw.

Instr. No. 14.139.2. Neglect.

I.C. 35-46-3-0.5.

The term "neglect" means:

[endangering an animal's health by failing to provide or arrange to provide the animal with food or drink, if the animal is dependent upon the person for the provision of food or drink;]

[or]

[restraining an animal for more than a brief period in a manner that endangers the animal's life or health by the use of a rope, chain, or tether that:

(i) is less than three (3) times the length of the animal;

(ii) is too heavy to permit the animal to move freely; or

(iii) causes the animal to choke]

[or]

[restraining an animal in a manner that seriously endangers the animal's life or health]

[or]

[failing to:

(i) provide reasonable care for; or

(ii) seek veterinary care for;

an injury or illness to a dog or cat that seriously endangers the life or health of the dog or cat]

[or]

[leaving a dog or cat outside and exposed to:

(i) excessive heat without providing the animal with a means of shade from the heat; or

(ii) excessive cold if the animal is not provided with straw or another means of protection from the cold;

regardless of whether the animal is restrained or kept in a kennel.]

Instruction No. 14.140. "Offender Under I.C. 35-42-4-11" (Offender Against Children).

I.C. 35-42-4-11.

A person is an "offender under I.C. 35-42-4-11" if that person

[is an offender under I.C. 35-38-1-7.5 (*see Instruction No. 14.190*)]

[or]

[has been convicted once or more of

[committing]

[or]

[attempting to commit]

[or]

[conspiring to commit]

(child molesting {*IC 35-42-4-3**})

(child exploitation {*IC 35-42-4-4(b)**})

(child solicitation {*IC 35-42-4-6*}*)

(child seduction {*IC 35-42-4-7*}*)

(kidnapping {*IC 35-42-3-2*}*, if the victim is less than eighteen {18} years of age) and the person is not the child's parent or guardian)

(an offense in another jurisdiction that is substantially similar to {child molesting} {child exploitation} {child solicitation} {child seduction} {kidnapping, if the victim is less than eighteen (18) years of age and the person is not the child's parent or guardian})].

Comments

*The statute numbers in this definitional paragraph are for the benefit of the judge, and are not intended to be given to the jury.

The term "offender under I.C. 35-42-4-11" used in this instruction is a substitute for the "offender against children" terminology in IC 35-42-4-11. The instruction also uses "offender under I.C. 35-38-1-7.5" as a substitute for the "sexually violent predator" terminology in I.C. 35-38-1-7.5. The instruction avoids using "offender against children" and "sexually violent predator" for the same reasons that *Spearman v. State*, 744 N.E.2d 545 (Ind. Ct. App. 2001) urged trial courts not to use the term "serious violent felon" in I.C. 35-47-4-5 trials. If the parties stipulate that the defendant has a prior conviction or adjudication making him an "offender under I.C. 35-42-4-11" or that the defendant is an "offender under I.C. 35-42-4-11" because he is "an offender under I.C. 35-38-1-7.5," it is suggested that the court use only the "offender under I.C. 35-42-4-11"

language and then advise the jury that they are instructed to consider the defendant to be an "offender under I.C. 35-42-4-11" because the State and the defendant have stipulated he was.

The Committee has concluded that the "substantially similar" issue about another jurisdiction's offense is for the court to determine, by judicially noticing the offense's definition and comparing it with the Indiana offense. *See Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance"). In making the similarity determination, the court must look at the definition of the other jurisdiction's offense in effect at the time of the Indiana crime charged in the current prosecution. *See State v. Akins*, 824 N.E.2d 676 (Ind. 2005) (with Indiana OVWI "previous conviction of operating while intoxicated" definition as a conviction "in any other jurisdiction in which the elements of the crime for which the conviction was entered are substantially similar to the elements of the Indiana offense," "the correct comparison is between the Michigan statute under which the defendant was convicted and the Indiana statute at the time of the Indiana offense," not at the time the prior Michigan conviction was entered).

Instruction No. 14.141. Offense.

I.C. 35-41-1-19.

The term "offense" is defined by law as meaning a crime. The term does not include an infraction.

Instr. No. 14.141.5. Officer.

I.C. 35-44-3-3.5.

The term "officer" is defined by law as including the following:

[law enforcement officer]

[or]

[A person employed by

{the department of correction}

{or}

{a law enforcement agency}

{or}

{a probation department}

[or}

{a county jail}

{or}

{a circuit, superior, county, probate, city, or town court}

who is required to carry a firearm in performance of the person's official duties].

Comments

For use with disarming a law enforcement officer offenses under I.C. 35-44-3-3.5, Instruction No. 5.22.

(Text continued on page 14-147)

Instruction No. 14.142. Overpass.

I.C. 35–42–2–5.

"Overpass" means a bridge or other structure designed to carry vehicular or pedestrian traffic over any roadway, railroad track, or waterway.

Instruction No. 14.142A. Overpressure Device.

I.C. 35-47.5-2-11.

"Overpressure device" means:

a frangible container filled with an explosive gas or expanding gas that is designed or constructed to cause the container to break or fracture in a manner that is capable of causing death, bodily harm, or property damage; or a container filled with an explosive gas or expanding gas or chemicals that generate an expanding gas.

Comments

This instruction is for use with I.C. 35–47.5 controlled explosives offenses.

Instruction No. 14.143. Official Proceeding.

I.C. 35-41-1-20.

The term "official proceeding" is defined by law as meaning a proceeding held or that may be held before a legislative, judicial, administrative, or other agency or before an official authorized to take evidence under oath, including a referee, hearing examiner, commissioner, notary, or other person taking evidence in connection with a proceeding.

Instruction No. 14.145. Owned and Controlled.

I.C. 4–13–16.5–1.

The term "owned and controlled" is defined by law as meaning having:

(1) ownership of at least fifty-one percent (51%) of the enterprise, including corporate stock of a corporation;

(2) control over the management and day-to-day operations of the business; and (3) an interest in the capital, assets, and profits and losses of the business proportionate to the percentage of ownership.

Instruction No. 14.146. Party.

I.C. 35–43–9–1.

As used in I.C. 35–43–9 statutes on conversion or misappropriation of title insurance escrow funds, the term "party" means an individual who is buying, selling, or refinancing a dwelling in a residential real property transaction.

Comments

As used in this instruction, the term "residential real property transaction" is defined by law. *See* I.C. 35–43–9–3; Instruction No. 14.14.178.

Instruction No. 14.147. Pattern of Racketeering Activity.

I.C. 35–45–6–1.

The term "pattern of racketeering activity" means engaging in at least two (2) incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents; however, the incidents are a pattern of racketeering activity only if at least one (1) of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five (5) years after a prior incident of racketeering activity.

Instruction No. 14.147.5. Pecuniary.

The term "pecuniary" means of, relating to, or consisting of money or something of value.

Comment

This instruction is optional. It is for use with Instruction No. 5.06, Official Misconduct. The definition for "pecuniary" here is not from statute. It is a dictionary definition which the Committee suggests may be helpful to jurors who may not have a clear understanding of "pecuniary." The definition is from The New Oxford American Dictionary (2001). Other definitions, as agreed to by the parties, may be substituted.

(Text continued on page 14-155)

Instruction No. 14.148. Peep.

I.C. 35–45–4–5.

"Peep" means any looking of a clandestine, surreptitious, prying or secretive nature.

Instruction No. 14.149. Penal Facility.

I.C. 35–41–1–21.

The term "penal facility" is defined by law as meaning a state prison, reformatory, county jail, penitentiary, house of correction, state farm, or any other facility for confinement of persons under sentence, or awaiting trial or sentence, for offenses.

Instruction No. 14.151. Performance.

I.C. 35–49–1–7.

"Performance" means any play, motion picture, dance, or other exhibition or presentation, whether pictured, animated, or live, performed before an audience of one (1) or more persons.

Instruction No. 14.153. Person.

I.C. 35–41–1–22.

The term "person" is defined by law as meaning a human being, corporation, partnership, unincorporated association, or governmental entity.

Instruction No. 14.154. Person.

I.C. 35–43–9–2.

As used in the I.C. 35–43–9 statutes on conversion or misappropriation of title insurance escrow funds, the term "person" means an individual, a corporation, a limited liability company, a partnership, a firm, an association, or another organization.

Instruction No. 14.155. Person — Home Improvement Frauds.

I.C. 35-43-6-7.

The term "person" means an individual, corporation, business trust, estate, trust, partnership, association, cooperative, or any other legal entity.

Instruction No. 14.156 Possession.

The word "possess" means to own or to exert control over. The word "possession" can take on several different, but related, meanings.

There are two kinds of "possession" -actual possession and constructive possession. A person who knowingly has direct physical control of a thing at a given time is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise control over a thing, either directly or through another person or persons, is then in constructive possession of it.

[Possession may be sole or joint. If one person alone has actual or constructive possession of a thing, then possession is sole. If two or more persons share actual or constructive possession of a thing, then possession is joint.]

Possession may be actual or constructive[, and either alone or jointly with others].

Notes

Portions of this instruction which are not applicable to the case should be omitted. If sole or joint possession is not an issue in the trial, for example, the paragraph explaining this concept should not be given to the jury.

In cases in which possession "of the premises is not exclusive, the inference of intent must be supported by additional circumstances pointing to an accused's knowledge of the nature of the controlled substances and their presence." *Fassoth v. State*, 525 N.E.2d 318, 323 (Ind. 1988).

Comments

This definition is for use with home improvement fraud offenses, I.C. 35–43–6.

Instruction No. 14.157. Practitioner.

I.C. 35–42–2–8(a); I.C. 35–48–1–24.

The term "practitioner" means a physician, dentist, veterinarian [**but not in interference with health care cases, I.C. 35–42–2–8(a)]**, scientific investigator, pharmacy, hospital, or other institution or individual licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, or administer a controlled substance in the course of professional practice or research in Indiana.

(Text continued on page 14–163)

Instruction No. 14.157a. Prescription Drug.

I.C. 35–42–2–8(a).

"Prescription drug" means a controlled substance or a legend drug (as defined in IC 16–18–2–199).

Instruction No. 14.158. Previous Conviction of Operating While Intoxicated.

I.C. 9–13–2–130.

The term "previous conviction of operating while intoxicated" means a previous conviction:

(1) In Indiana of:

(A) An alcohol related or drug related crime under Acts 1939, c.48, s.52, as amended, IC 9–4–1–54 (repealed September 1, 1983), or I.C. 9–11–2 (repealed July 1, 1991); or

(B) A crime under IC 9–30–5–1 through 9–30–5–9;

(or)

(2) In any other jurisdiction: in which the elements of the crime for which the conviction was entered are substantially similar to the elements of a crime described in IC 9–30–5–1 through IC 9–30–5–9.

Instruction No. 14.159. Principal.

I.C. 35–45–7–1.

"Principal" includes the monetary value of property which has been loaned from one (1) person to another person.

Instruction No. 14.160. Private Area.

"Private area" means the naked or undergarment-clad genitals, pubic area, or buttocks of an individual.

Comment

This instruction is for use with Instruction No. 6.12.1, Public Voyeurism.

Instruction No. 14.161. Production.

I.C. 35-48-1-26.

The term "production" includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

Instruction No. 14.162. Professional Relationship.

I.C. 35-42-4-7.

A person has a "professional relationship" with a child if:

(1) the person:

(A) has a license issued by the state or a political subdivision on the basis of the person's training and experience that authorizes the person to carry out a particular occupation; or

(B) is employed in a position in which counseling, supervising, instructing, or recruiting children forms a significant part of the employment; and

(2) the person has a relationship with a child that is based on the person's employment or licensed status as described in (1).

[(*use if applicable*) The term includes a relationship between a child and a (mental health professional) (military recruiter).]

[(*use if applicable*)The term does not include a coworker relationship between a child and a person described in (1)(B).]

In determining whether a person used or exerted the person's professional relationship with the child to engage in [sexual intercourse] [deviate sexual conduct] [fondling or touching with the intent to arouse or satisfy the sexual desires of the child or the person], the trier of fact may consider one (1) or more of the following:

(1) The age difference between the person and the child.

(2) Whether the person was in a position of trust with respect to the child.

(3) Whether the person's conduct with the child violated any ethical obligations of the person's profession or occupation.

(4) The authority that the person had over the child.

(5) Whether the person exploited any particular vulnerability of the child.

(6) Any other evidence relevant to the person's ability to exert undue influence over the child.

Comments

This instruction is for use with Instruction No. 3.45.1, Child Seduction—Professional Relationship.

The following terms in this instruction have definitional instructions: "deviate sexual conduct" (Instruction No. 14.57), "mental health professional" (Instruction No. 14.133.2), "military recruiter" (Instruction 14.133.5), and "sexual intercourse" (Instruction No. 14.189).

(Text continued on page 14-167)

Instruction No. 14.163 Profit.

I.C. 35–45–5–1.

The term "profit" is defined by law as meaning a realized or unrealized benefit [other than a gain] and includes benefits from proprietorship or management and unequal advantage in a series of transactions.

Instruction No. 14.165. Property.

I.C. 35–41–1–23.

The term "property" is defined by law as meaning anything of value; and includes a gain or advantage or anything that might reasonably be regarded as such by the beneficiary; real property, personal property, money, labor, services; intangibles; commercial instruments, written instruments concerning labor, services, or property; written instruments otherwise of value to the owner, such as a public record, deed, will, credit card, or letter of credit; a signature or a written instrument; extension of credit; trade secrets; contract rights, choses-in-action, and other interest in or claims to wealth; electricity, gas, oil, and water; captured or domestic animals, birds, and fish; food and drink; and human remains.

Instruction No. 14.166. Proximate Cause.

"Proximate cause" is that cause which, in natural and continual sequence, unbroken by any efficient intervening cause, produces the injury (or death) and without which, the injury (or death) would not have occurred.

Instruction No. 14.166a. Public Park.

I.C. 35–41–1–23.7.

The term "public park" means any property operated by a political subdivision for park purposes, defined in IC 36–10–1–2 as including the establishment, equipment, and operation of parks, boulevards, pleasure drives, parkways, wheelways, park boulevards, bridlepaths, playgrounds, playfields, bathhouses, comfort stations, swimming pools, community centers, recreation centers, other recreational facilities, and recreational programs.

Instruction No. 14.167. Public Relief or Assistance.

I.C. 35-43-5-1.

The term "public relief or assistance" means any payment made, service rendered, hospitalization provided, or other benefit extended to a person by a governmental entity from public funds and includes poor relief, food stamps, direct relief, unemployment compensation, and any other form of support or aid.

Instruction No. 14.169. Public Servant.

I.C. 35-41-1-24.

The term "public servant" is defined by law as meaning a person who:

(1) is authorized to perform an official function on behalf of, and is paid by, a governmental entity;

(2) is elected or appointed to office to discharge a public duty for a governmental entity; or,

(3) with or without compensation, is appointed in writing by a public official to act in an advisory capacity to a governmental entity concerning a contract or purchase to be made by the entity.

The term does not include a person appointed by the governor to an honorary advisory or honorary military position.

Instruction No. 14.169A. Public Servant.

I.C. 35-41-3-2.

The term "public servant" means:

(1) a police officer (including a correctional police officer), sheriff, constable, marshal, prosecuting attorney, special prosecuting attorney, special deputy prosecuting attorney, the securities commissioner, or the inspector general;

(2) a deputy of any of those persons;

(3) an investigator for a prosecuting attorney or for the inspector general;

(4) a conservation officer;

(5) an enforcement officer of the alcohol and tobacco commission; or

(6) an enforcement officer of the securities division of the office of the secretary of state.

(7) A Federal Bureau of Investigation special agent.

(8) A United States Marshals Service marshal or deputy.

(9) A United States Secret Service special agent.

(10) A United States Fish and Wildlife Service special agent.

(11) A United States Drug Enforcement Agency agent.

(12) A Bureau of Alcohol, Tobacco, Firearms and Explosives agent.

(13) A United States Forest Service law enforcement officer.

(14) A United States Department of Defense police officer or criminal investigator.

(15) A United States Customs Service agent.

(16) A United States Postal Service investigator.

(17) A National Park Service law enforcement commissioned ranger.

(18) United States Department of Agriculture, Office of Inspector General special agent.

(19) A United States Citizenship and Immigration Services special agent.

(20) An individual who is

(A) an employee of a federal agency; and

(B) authorized to make arrests and carry a firearm in the performance of the individual's official duties.

Comment

This definition of "public servant" is for use only with instructions 10.03C, 10.03D, 10.03E, and 10.03F, all concerning the defense of lawful use against a

"public servant" of force or deadly force.

(Text continued on page 14-173)

Instruction No. 14.170. Publish.

I.C. 35–45–13–2.

The term "publish" means the communication or dissemination of information to at least one (1) person by any of the following methods:

(1) Orally.

(2) In person.

(3) By telephone, radio, or television.

(4) In a writing of any kind, including a letter, memorandum, circular handbill, newspaper, magazine article, or book.

Instruction No. 14.171. Racial Minority Group.

I.C. 4–13–16.5–1.

The term "racial minority group" is defined by law as meaning Blacks, American Indians, Hispanics, Asian Americans, and other similar racial minority groups.

Instruction No. 14.173. Racketeering Activity.

I.C. 35–45–6–1.

The term "racketeering activity" means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation of a provision of I.C. [*here insert the statute which is applicable to the charge contained in the affidavit or indictment*].

Comments

I.C. 35–45–6–1 specifies the criminal violations which can constitute "racketeering activity."

Instruction No. 14.175. Rate.

I.C. 35–45–7–1.

The word "rate" is defined by law as meaning the monetary value of the consideration received per annum or due per annum, calculated according to the actuarial method on the unpaid balance of the principal.

Comments

The term "principal" is defined by law. See I.C. 35–45–7–1; Instruction No. 14.159.

Instruction No. 14.177. Receiving.

I.C. 35–43–4–1(c).

The term "receiving" is defined by law as meaning acquiring possession or control of or title to property, or lending on the security of property.

Instr. No. 14.177A. Regulated Explosive.

I.C. 35–47.5–2–13.

"Regulated explosive" includes a destructive device and an explosive.

Comments

This definition applies only to I.C. 35-47.5 controlled explosives offenses.

I.C. 35-47.5-2-13 contains a list of items which the definition above of "regulated explosives" does not include. The Committee believes that items on this list constitute "exceptions" or "exemptions" which the Defendant has the burden to prove. *See Harris v. State*, 716 N.E.2d 406 (Ind. 1999); *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001). The statutory list of exceptions is:

(1) An explosive in a manufactured article that is designed and packaged in a manner that is likely to prevent an explosion resulting in property damage or personal injury. A manufactured article to which this subdivision applies includes fixed ammunition for small arms, a firework, and a safety fuse match.

(2) Gasoline, kerosene, naphtha, turpentine, or benzine.

(3) An explosive that is being transported on or in a vessel, railroad car, or highway vehicle in conformity with the regulations adopted by the United States Department of Transportation.

(4) A blasting explosive that is transported or used for agricultural purposes and that is in a quantity that does not exceed two hundred (200) pounds.

(5) Ammonium nitrate or other explosive compounds kept for mining purposes at coal mines regulated under IC 14-34.

Instruction No. 14.177B. Required to Register as an Offender Under I.C. 11-8-8-Withdrawn.

I.C. 11-8-8-5.

This instruction has been withdrawn.

Instruction No. 14.178. Residential Real Property Transaction.

I.C. 35-43-9-3.

As used in the I.C. 35-43-9 statutes on conversion or misappropriation of title insurance escrow funds, the term "residential real property transaction" means the purchase, sale, or refinancing of a dwelling that has been or will be the residence of a party in the purchase, sale, or refinancing.

[Next Page is 14-189]

Instruction No. 14.178.5. Salvia.

I.C. 35-41-1-24.2

"Salvia" means salvia divinorum or salvinorin A, including:

(1) all parts of the plant that are classified botanically as salvia divinorum, whether growing or not;

(2) the seeds of the plant;

(3) any extract from any part of the plant; and

(4) every compound, manufacture, derivative, mixture, or preparation of the plant, its seeds, or extracts, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation of the plant, its seeds, or extracts.

The term does not include any other species in the genus salvia.

Instruction No. 14.179. Sawed-Off Shotgun.

I.C. 35-47-1-10.

The term "sawed-off shotgun" means:

(1) a shotgun having one or more barrels less than eighteen [18] inches in length; and

(2) any weapon made from a shotgun (whether by alteration, modification, or otherwise) if the weapon as modified has an overall length of less than twenty-six [26] inches.

Instruction No. 14.181. School Bus.

I.C. 35-41-1-24.3.

The term "school bus" means any motor vehicle designed and constructed for the accommodation of more than ten (10) passengers, which is used for the transportation of Indiana school children.

Comments

The term "motor vehicle" is defined by law. *See* I.C. 35-41-1-18.5; Instruction No. 14.137.

Note that the offense of possession of a knife at school, Instruction No. 7.89 and I.C. 35-47-5-2.5, employs the definition of "school bus" in I.C. 20-27-2-8:

"School bus" means a motor vehicle, other than a special purpose bus, that is:

(1) designed and constructed for the accommodation of more than ten (10) passengers; and

(2) used for the transportation of Indiana students.

The term includes the chassis or the body, or both.

The term "special purpose bus" is defined by law. *See* Instruction No. 14.192; I.C. 20-27-2-8.

(Text continued on page 14-191)

Instruction No. 14.183. School Property.

I.C. 35–41–1–24.7.

The term "school property" means:

(1) a building or other structure owned or rented by

(A) a school corporation;

(B) an entity that is required to be licensed under IC 12–17.2 or IC 12–17.4;

(C) a private school (as defined in IC 20–9.1–1–3); or

(D) a federal, state, local, or nonprofit program or service operated to serve, assist, or otherwise benefit children who are at least three (3) years of age and not yet enrolled in kindergarten, including the following:

(i) a Head Start program under 42 U.S.C. 9831 et seq.

(ii) a special education preschool program

(iii) a developmental child care program for preschool children.

(2) the grounds adjacent to and owned or rented in common with a building or other structure described in subdivision (1).

Instruction No. 14.184. Scientific Research Facility.

I.C. 35–41–1–24.8.

The term "scientific research facility" means a facility in which research is conducted.

Instruction No. 14.184.5. Search and Rescue Dog.

I.C. 35-46-3-11.3.

The term "search and rescue dog" means a dog that receives special training to locate or attempt to locate by air scent or ground or water tracking a person who is an offender or is lost, trapped, injured, or incapacitated.

Instruction No. 14.185. Serious Bodily Injury.

I.C. 35–41–1–25.

The term "serious bodily injury" is defined by law as meaning bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, unconsciousness, extreme pain, or permanent or protracted loss or impairment of the function of a bodily member or organ.

Instruction No. 14.187. Service Provider.

I.C. 35-44-1-5.

The term "service provider" means a public servant or other person employed by a governmental entity or another person who provides goods or services to a person who is subject to lawful detention.

Instruction No. 14.188. Sexual Conduct.

I.C. 35-42-4-4.

The term "sexual conduct" means sexual intercourse, deviate sexual conduct, exhibition of the uncovered genitals intended to satisfy or arouse the sexual desires of any person, sadomasochistic abuse, sexual intercourse or deviate sexual conduct with an animal, or any fondling or touching of a child by another person or of another person by a child intended to arouse or satisfy the sexual desires of either the child or the other person.

Instruction No. 14.189. Sexual Intercourse.

I.C. 35-41-1-26.

The term "sexual intercourse" is defined by law as meaning an act that includes any penetration of the female sex organ by the male sex organ.

Instruction No. 14.190.1. "Offender Under 35-38-1-7.5" [Sexually Violent Predator] Based on Single Offense.

I.C. 35-38-1-7.5(b)(1).

A person is an offender under 35-38-1-7.5 if when he/she was at least eighteen [18] he/she

[committed]

[or]

[attempted to commit]

[or]

[conspired to commit]

{the Indiana offense of}

{or}

{a crime under the laws of another jurisdiction, including a military court, that is substantially similar to the Indiana offense of}

[rape {*IC 35-42-4-1**}]

[or]

[criminal deviate conduct {*IC 35-42-4-2**}]

[or]

[child molesting as a Class A or Class B felony {*IC 35-42-4-3**}]

[or]

[vicarious sexual gratification {*IC 35-42-4-5**}

(by touching or fondling a child under the age of fourteen [14])

(or)

(by using or threatening the use of deadly force)

(or)

(while armed with a deadly weapon)

(or)

(when commission of the offense is facilitated by furnishing the victim, without the victim's knowledge, with a drug or controlled substance)

(or)

(when commission of the offense is facilitated by knowing that the victim was furnished with a drug or controlled

substance)

(or)

(resulting in serious bodily injury)

(or)

(by directing, aiding, inducing, or causing a child under the age of sixteen [16] to engage in sexual intercourse with another child under the age of sixteen [16]

[when any child involved in the offense was less than fourteen [14] years of age]

[or]

[when the offense was committed by using or threatening the use of deadly force]

[or]

[when the offense was committed while armed with a deadly weapon]

[or]

[when the offense resulted in serious bodily injury]

[or]

[when the offense was facilitated by

{furnishing the victim without the victim's knowledge with a drug or controlled substance}

{or}

{knowing that the victim was furnished with a drug or controlled substance}])

(or)

(by directing, aiding, inducing or causing a child under the age of sixteen [16] to engage in sexual conduct with an animal other than a human being)

(or)

(by directing, aiding, inducing, or causing a child under the age of sixteen [16] to engage in deviate sexual conduct with another person

[when any child involved in the offense was less than fourteen {14} years of age]

[or]

[when the offense was committed by using or threatening the use of deadly force]

[or]

[when the offense was committed while armed with a deadly weapon]

[or]

[when the offense resulted in serious bodily injury]

[or]

[when the offense was facilitated by

{furnishing the victim without the victim's knowledge with a drug or controlled substance}

{or}

{knowing that the victim was furnished with a drug or controlled substance}])]

and he/she was released from incarceration, secure detention, or probation for the offense after June 30, 1994.

Comments

*The statute numbers in this definitional paragraph are for the benefit of the judge, and are not intended to be given to the jury.

The term "offender under I.C. 35-38-1-7.5" used in this instruction is a substitute for the "sexually violent predator" terminology in I.C. 35-38-1-7.5. The instruction avoids using "sexually violent predator" for the same reasons that *Spearman v. State*, 744 N.E.2d 545 (Ind. Ct. App. 2001) urged trial courts not to use the term "serious violent felon" in I.C. 35-47-4-5 trials. If the parties stipulate that the defendant has a prior conviction or adjudication making him an "offender under I.C. 35-38-1-7.5," it is suggested that the court use only the "offender under I.C. 35-38-1-7.5" language and then advise the jury that they are instructed to consider the defendant to be an "offender under I.C. 35-38-1-7.5" because the State and the defendant have stipulated he was.

In many cases, the defendant will be willing to stipulate to the sexually violent predator status, and such offers will usually bind the State. *See Hines v. State*, 801 N.E.2d 634 (Ind. 2004) (adopting U.S. Supreme Court position on defense offers to stipulate legal status which is independent of the charged crime, in *Old Chief v. United States*, 519 U.S. 172, 186–187, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997)).

When the defendant refuses to stipulate to the sexually violent predator status, it will have to be proven to the jury, beyond a reasonable doubt where it is an element of the crime. There are five alternative ways in which a person can be a sexually violent predator under the present Indiana statute. This instruction covers

the first alternative. To use the instruction, limit it to the particular prior convictions or other status foundations the State alleges as the basis for the status.

The Committee has concluded that the "substantially similar" issue about another jurisdiction's offense is for the court to determine, by judicially noticing the offense's definition and comparing it with the Indiana offense. *See Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance"). In making the similarity determination, the court must look at the definition of the other jurisdiction's offense in effect at the time of the Indiana crime charged in the current prosecution. *See State v. Akins*, 824 N.E.2d 676 (Ind. 2005) (with Indiana OVWI "previous conviction of operating while intoxicated" definition as a conviction "in any other jurisdiction in which the elements of the crime for which the conviction was entered are substantially similar to the elements of the Indiana offense," "the correct comparison is between the Michigan statute under which the defendant was convicted and the Indiana statute at the time of the Indiana offense," not at the time the prior Michigan conviction was entered).

Instruction No. 14.190.2. "Offender Under 35-38-1-7.5" [Sexually Violent Predator] Based on Offense With a Prior Unrelated Conviction.

I.C. 35-38-1-7.5(b)(2).

A person is an offender under I.C. 35-38-1-7.5 if he/she

[committed]

[or]

[attempted to commit]

[or]

[conspired to commit]

{the Indiana offense of}

{or}

{a crime under the laws of another jurisdiction, including a military court, that is substantially equivalent to the Indiana offense of}

[rape {*IC 35-42-4-1**}]

[or]

[criminal deviate conduct {*IC 35-42-4-2**}]

[or]

[child molesting {*IC 35-42-4-2**}]

[or]

[child exploitation {*IC 35-42-4-4(b)**}]

[or]

[vicarious sexual gratification (including performing sexual conduct in the presence of a minor) {*IC 35-42-4-5**}]

[or]

[child solicitation {*IC 35-42-4-6**}]

[or]

[child seduction {*IC 35-42-4-7**}]

[or]

[sexual misconduct with a minor as a Class A, Class B, or Class C felony {*IC 35-42-4-9**}

unless

- the person is convicted of sexual misconduct with a minor as a Class C felony, and
- the person is not more than

- four years older than the victim if the offense was committed after June 30, 2007, and

or

- five years older than the victim if the offense was committed before July 1, 2007, and

- the sentencing court finds that the person should not be required to register as a sex offender]

[or]

[incest {*IC 35-46-1-3**}]

[or]

[sexual battery {*IC 35-42-4-8**}]

[or]

[kidnapping {*IC 35-42-3-2**}, if the victim is less than eighteen (18) years of age, and the person who kidnapped the victim is not the victim's parent or guardian]

[or]

[criminal confinement {*IC 35-42-3-3**}, if the victim is less than eighteen (18) years of age, and the person who kidnapped the victim is not the victim's parent or guardian]

[or]

[possession of child pornography {*IC 35-42-4-4(c)**}]

[or]

[promoting prostitution {*IC 35-45-4-4**} as a Class B felony]

[or]

[promotion of human trafficking {*IC 35-42-3.5-1(a)(2)**} if the victim is less than eighteen (18) years of age]

[or]

[sexual trafficking of a minor {*IC 35-42-3.5-1(b)**}]

[or]

[human trafficking {*IC 35-42-3.5-1(c)(3)**} if the victim is less than eighteen (18) years of age]

[or]

[sexual misconduct by a service provider with a detained child {*IC 35-44-1-5(c)*}]

when he/she had a prior conviction of

{the Indiana offense of}

{or}

{a crime under the laws of another jurisdiction, including a military court, that is substantially equivalent to the Indiana offense of}

[committing]

[or]

[attempting to commit]

[or]

[conspiring to commit]

{rape [*IC 35-42-4-1**]}

{or}

{criminal deviate conduct [*IC 35-42-4-2**]}

{or}

{child molesting [*IC 35-42-4-2**]}

{or}

{child exploitation [*IC 35-42-4-4(b)**]}

{or}

{vicarious sexual gratification (including performing sexual conduct in the presence of a minor) [*IC 35-42-4-5**]}

{or}

{child solicitation [*IC 35-42-4-6**]}

{or}

{child seduction [*IC 35-42-4-7**]}

{or}

{sexual misconduct with a minor as a Class A, Class B, or Class C felony [*IC 35-42-4-9**]

unless

- the person is convicted of sexual misconduct with a minor as a Class C felony, and
- the person is not more than
  - four years older than the victim if the offense was committed after June 30, 2007, and

or

- five years older than the victim if the offense was committed before July 1, 2007, and
- the sentencing court finds that the person should not be required to register as a sex offender}

{or}

{incest [*IC 35-46-1-3**]}

{or}

{sexual battery [*IC 35-42-4-8**]}

{or}

{kidnapping [*IC 35-42-3-2**], if the victim is less than eighteen (18) years of age, and the person who kidnapped the victim is not the victim's parent or guardian}

{or}

{criminal confinement [*IC 35-42-3-3**], if the victim is less than eighteen (18) years of age, and the person who kidnapped the victim is not the victim's parent or guardian}

{or}

{possession of child pornography [*IC 35-42-4-4(c)**]}

{or}

{promoting prostitution [*IC 35-45-4-4**] as a Class B felony}

{or}

{promotion of human trafficking [*IC 35-42-3.5-1(a)(2)**] if the victim is less than eighteen (18) years of age}

{or}

{sexual trafficking of a minor [*IC 35-42-3.5-1(b)**]}

{or}

{human trafficking [*IC 35-42-3.5-1(c)(3)**] if the victim is less than eighteen (18) years of age}

{or}

{sexual misconduct by a service provider with a detained child [*IC 35-44-1-5(c)*]}

and he/she was released from incarceration, secure detention, or probation for the offense after June 30, 1994.

Comments

*The statute numbers in this definitional paragraph are for the benefit of the judge, and are not intended to be given to the jury.

The term "offender under I.C. 35-38-1-7.5" used in this instruction is a substitute for the "sexually violent predator" terminology in I.C. 35-38-1-7.5. The instruction avoids using "sexually violent predator" for the same reasons that *Spearman v. State*, 744 N.E.2d 545 (Ind. Ct. App. 2001) urged trial courts not to use the term "serious violent felon" in I.C. 35-47-4-5 trials. If the parties stipulate that the defendant has a prior conviction or adjudication making him an "offender under I.C. 35-38-1-7.5," it is suggested that the court use only the "offender under I.C. 35-38-1-7.5" language and then advise the jury that they are instructed to consider the defendant to be an "offender under I.C. 35-38-1-7.5" because the State and the defendant have stipulated he was.

In many cases, the defendant will be willing to stipulate to the sexually violent predator status, and such offers will usually bind the State. *See Hines v. State*, 801 N.E.2d 634 (Ind. 2004) (adopting U.S. Supreme Court position on defense offers to stipulate legal status which is independent of the charged crime, in *Old Chief v. United States*, 519 U.S. 172, 186-187, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997)).

When the defendant refuses to stipulate to the sexually violent predator status, it will have to be proven to the jury, beyond a reasonable doubt where it is an element of the crime. There are five alternative ways in which a person can be a sexually violent predator under the present Indiana statute. This instruction covers the second alternative. To use the instruction, limit it to the particular prior convictions or other status foundations the State alleges as the basis for the status.

The Committee has concluded that the "substantially similar" issue about another jurisdiction's offense is for the court to determine, by judicially noticing the offense's definition and comparing it with the Indiana offense. *See Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance"). In making the similarity determination, the court must look at the definition of the other jurisdiction's offense in effect at the time of the Indiana crime charged in the current prosecution. *See State v. Akins*, 824 N.E.2d 676 (Ind. 2005) (with Indiana OVWI "previous conviction of operating while intoxicated" definition as a conviction "in any other jurisdiction in which the elements of the crime for which the conviction was entered are substantially similar to the elements of the Indiana offense," "the correct comparison is between the Michigan statute under which the defendant was convicted and the Indiana statute at the time of the Indiana offense," not at the time the prior Michigan conviction was entered).

Instruction No. 14.190.3. "Offender Under I.C. 35-38-1-7.5" [Sexually Violent Predator] Based on Offense With a Previous Unrelated Adjudication and a Determination Likely to Offend Again.

I.C. 35-38-1-7.5(b)(3).

A person is an offender under I.C. 35-38-1-7.5 if he/she

[committed]

[or]

[attempted to commit]

[or]

[conspired to commit]

{the Indiana offense of}

{or}

{a crime under the laws of another jurisdiction, including a military court, that is substantially equivalent to the Indiana offense of}

[rape {*IC 35-42-4-1**}]

[or]

[criminal deviate conduct {*IC 35-42-4-2**}]

[or]

[child molesting {*IC 35-42-4-2**}]

[or]

[child exploitation {*IC 35-42-4-4(b)**}]

[or]

[vicarious sexual gratification (including performing sexual conduct in the presence of a minor) {*IC 35-42-4-5**}]

[or]

[child solicitation {*IC 35-42-4-6**}]

[or]

[child seduction {*IC 35-42-4-7**}]

[or]

[sexual misconduct with a minor as a Class A, Class B, or Class C felony {*IC 35-42-4-9**}

unless

- the person is convicted of sexual misconduct with a minor as a Class C felony, and

- the person is not more than
  - four years older than the victim if the offense was committed after June 30, 2007, and

  or
  - five years older than the victim if the offense was committed before July 1, 2007, and
- the sentencing court finds that the person should not be required to register as a sex offender]

[or]

[incest {*IC 35-46-1-3**}]

[or]

[sexual battery {*IC 35-42-4-8**}]

[or]

[kidnapping {*IC 35-42-3-2**}, if the victim is less than eighteen (18) years of age, and the person who kidnapped the victim is not the victim's parent or guardian]

[or]

[criminal confinement {*IC 35-42-3-3**}, if the victim is less than eighteen (18) years of age, and the person who kidnapped the victim is not the victim's parent or guardian]

[or]

[possession of child pornography {*IC 35-42-4-4(c)**}]

[or]

[promoting prostitution {*IC 35-45-4-4**} as a Class B felony]

[or]

[promotion of human trafficking {*IC 35-42-3.5-1(a)(2)**} if the victim is less than eighteen (18) years of age]

[or]

[sexual trafficking of a minor {*IC 35-42-3.5-1(b)**}]

[or]

[human trafficking {*IC 35-42-3.5-1(c)(3)**} if the victim is less than eighteen (18) years of age]

[or]

[sexual misconduct by a service provider with a detained child {*IC 35-44-1-5(c)*}]

when he/she had a previous unrelated adjudication as a delinquent child for an act which, if committed by an adult, would have been:

{the Indiana offense of}

{or}

{a crime under the laws of another jurisdiction, including a military court, that was substantially equivalent to the Indiana offense of}:

[committing]

[or]

[attempting to commit]

[or]

[conspiring to commit]

{rape [*IC 35-42-4-1**]}

{or}

{criminal deviate conduct [*IC 35-42-4-2**]}

{or}

{child molesting [*IC 35-42-4-2**]}

{or}

{child exploitation [*IC 35-42-4-4(b)**]}

{or}

{vicarious sexual gratification (including performing sexual conduct in the presence of a minor) [*IC 35-42-4-5**]}

{or}

{child solicitation [*IC 35-42-4-6**]}

{or}

{child seduction [*IC 35-42-4-7**]}

{or}

{sexual misconduct with a minor as a Class A, Class B, or Class C felony [*IC 35-42-4-9**]

unless

- the person is convicted of sexual misconduct with a minor as a Class C felony, and
- the person is not more than
  - four years older than the victim if the offense was committed after June 30, 2007, and

or

- five years older than the victim if the offense was committed before July 1, 2007, and

- the sentencing court finds that the person should not be required to register as a sex offender]

{or}

{incest [*IC 35-46-1-3**]}

{or}

{sexual battery [*IC 35-42-4-8**]}

{or}

{kidnapping [*IC 35-42-3-2**], if the victim is less than eighteen (18) years of age, and the person who kidnapped the victim is not the victim's parent or guardian}

{or}

{criminal confinement [*IC 35-42-3-3**], if the victim is less than eighteen (18) years of age, and the person who kidnapped the victim is not the victim's parent or guardian}

{or}

{possession of child pornography [*IC 35-42-4-4(c)**]}

{or}

{promoting prostitution [*IC 35-45-4-4**] as a Class B felony}

{or}

{promotion of human trafficking [*IC 35-42-3.5-1(a)(2)**] if the victim is less than eighteen (18) years of age}

{or}

{sexual trafficking of a minor [*IC 35-42-3.5-1(b)**]}

{or}

{human trafficking [*IC 35-42-3.5-1(c)(3)**] if the victim is less than eighteen (18) years of age}

{or}

{sexual misconduct by a service provider with a detained child [*IC 35-44-1-5(c)*]}

and was found by a court by clear and convincing evidence to be likely to commit an additional sex offense.

Comments

*The statute numbers in this definitional paragraph are for the benefit of the

judge, and are not intended to be given to the jury.

The term "offender under I.C. 35-38-1-7.5" used in this instruction is a substitute for the "sexually violent predator" terminology in I.C. 35-38-1-7.5. The instruction avoids using "sexually violent predator" for the same reasons that *Spearman v. State*, 744 N.E.2d 545 (Ind. Ct. App. 2001) urged trial courts not to use the term "serious violent felon" in I.C. 35-47-4-5 trials. If the parties stipulate that the defendant has a prior conviction or adjudication making him an "offender under I.C. 35-38-1-7.5," it is suggested that the court use only the "offender under I.C. 35-38-1-7.5" language and then advise the jury that they are instructed to consider the defendant to be an "offender under I.C. 35-38-1-7.5" because the State and the defendant have stipulated he was.

In many cases, the defendant will be willing to stipulate to the sexually violent predator status, and such offers will usually bind the State. *See Hines v. State*, 801 N.E.2d 634 (Ind. 2004) (adopting U.S. Supreme Court position on defense offers to stipulate legal status which is independent of the charged crime, in *Old Chief v. United States*, 519 U.S. 172, 186-187, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997)).

When the defendant refuses to stipulate to the sexually violent predator status, it will have to be proven to the jury, beyond a reasonable doubt where it is an element of the crime. There are five alternative ways in which a person can be a sexually violent predator under the present Indiana statute. This instruction covers the third alternative. To use the instruction, limit it to the particular prior convictions or other status foundations the State alleges as the basis for the status.

The Committee has concluded that the "substantially similar" issue about another jurisdiction's offense is for the court to determine, by judicially noticing the offense's definition and comparing it with the Indiana offense. *See Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance"). In making the similarity determination, the court must look at the definition of the other jurisdiction's offense in effect at the time of the Indiana crime charged in the current prosecution. *See State v. Akins*, 824 N.E.2d 676 (Ind. 2005) (with Indiana OVWI "previous conviction of operating while intoxicated" definition as a conviction "in any other jurisdiction in which the elements of the crime for which the conviction was entered are substantially similar to the elements of the Indiana offense," "the correct comparison is between the Michigan statute under which the defendant was convicted and the Indiana statute at the time of the Indiana offense," not at the time the prior Michigan conviction was entered).

Instruction No. 14.190.4. "Offender Under I.C. 35-38-1-7.5" [Sexually Violent Predator] Based on an Offense With a Previous Unrelated Adjudication and a Duty to Register.

I.C. 35-38-1-7.5(b)(4).

A person is an offender under I.C. 35-38-1-7.5 if he/she

[committed]

[or]

[attempted to commit]

[or]

[conspired to commit]

{the Indiana offense of}

{or}

{a crime under the laws of another jurisdiction, including a military court, that is substantially equivalent to the Indiana offense of}

[rape {*IC 35-42-4-1**}]

[or]

[criminal deviate conduct {*IC 35-42-4-2**}]

[or]

[child molesting {*IC 35-42-4-2**}]

[or]

[child exploitation {*IC 35-42-4-4(b)**}]

[or]

[vicarious sexual gratification (including performing sexual conduct in the presence of a minor) {*IC 35-42-4-5**}]

[or]

[child solicitation {*IC 35-42-4-6**}]

[or]

[child seduction {*IC 35-42-4-7**}]

[or]

[sexual misconduct with a minor as a Class A, Class B, or Class C felony {*IC 35-42-4-9**}

unless

- the person is convicted of sexual misconduct with a minor as a Class C felony, and

- the person is not more than
  - four years older than the victim if the offense was committed after June 30, 2007, and

  or
  - five years older than the victim if the offense was committed before July 1, 2007, and
- the sentencing court finds that the person should not be required to register as a sex offender]

[or]

[incest {*IC 35-46-1-3**}]

[or]

[sexual battery {*IC 35-42-4-8**}]

[or]

[kidnapping {*IC 35-42-3-2**}, if the victim is less than eighteen (18) years of age, and the person who kidnapped the victim is not the victim's parent or guardian]

[or]

[criminal confinement {*IC 35-42-3-3**}, if the victim is less than eighteen (18) years of age, and the person who kidnapped the victim is not the victim's parent or guardian]

[or]

[possession of child pornography {*IC 35-42-4-4(c)**}]

[or]

[promoting prostitution {*IC 35-45-4-4**} as a Class B felony]

[or]

[promotion of human trafficking {*IC 35-42-3.5-1(a)(2)**} if the victim is less than eighteen (18) years of age]

[or]

[sexual trafficking of a minor {*IC 35-42-3.5-1(b)**}]

[or]

[human trafficking {*IC 35-42-3.5-1(c)(3)**} if the victim is less than eighteen (18) years of age]

[or]

[sexual misconduct by a service provider with a detained child {*IC 35-44-1-5(c)*}]

when he/she had a previous unrelated adjudication as a delinquent child for an act which, if committed by an adult, would have been:

{the Indiana offense of}

{or}

{a crime under the laws of another jurisdiction, including a military court, that was substantially equivalent to the Indiana offense of}:

[committing]

[or]

[attempting to commit]

[or]

[conspiring to commit]

{rape [*IC 35-42-4-1**]}

{or}

{criminal deviate conduct [*IC 35-42-4-2**]}

{or}

{child molesting [*IC 35-42-4-2**]}

{or}

{child exploitation [*IC 35-42-4-4(b)**]}

{or}

{vicarious sexual gratification (including performing sexual conduct in the presence of a minor) [*IC 35-42-4-5**]}

{or}

{child solicitation [*IC 35-42-4-6**]}

{or}

{child seduction [*IC 35-42-4-7**]}

{or}

{sexual misconduct with a minor as a Class A, Class B, or Class C felony [*IC 35-42-4-9**]

unless

- the person is convicted of sexual misconduct with a minor as a Class C felony, and
- the person is not more than
  - four years older than the victim if the offense was committed after June 30, 2007, and

or

- five years older than the victim if the offense was committed before July 1, 2007, and

- the sentencing court finds that the person should not be required to register as a sex offender]

{or}

{incest [*IC 35-46-1-3**]}

{or}

{sexual battery [*IC 35-42-4-8**]}

{or}

{kidnapping [*IC 35-42-3-2**], if the victim is less than eighteen (18) years of age, and the person who kidnapped the victim is not the victim's parent or guardian}

{or}

{criminal confinement [*IC 35-42-3-3**], if the victim is less than eighteen (18) years of age, and the person who kidnapped the victim is not the victim's parent or guardian}

{or}

{possession of child pornography [*IC 35-42-4-4(c)**]}

{or}

{promoting prostitution [*IC 35-45-4-4**] as a Class B felony}

{or}

{promotion of human trafficking [*IC 35-42-3.5-1(a)(2)**] if the victim is less than eighteen (18) years of age}

{or}

{sexual trafficking of a minor [*IC 35-42-3.5-1(b)**]}

{or}

{human trafficking [*IC 35-42-3.5-1(c)(3)**] if the victim is less than eighteen (18) years of age}

{or}

{sexual misconduct by a service provider with a detained child [*IC 35-44-1-5(c)*]}

and the defendant had been required to register as a sex offender because he/she

was at least fourteen [14] years of age

and

was

[on probation]

[or]

[on parole]

[or]

[discharged from a facility by the department of correction]

[or]

[discharged from a secure private facility (as defined in IC 31-9-2-115)]

[or]

[discharged from a juvenile detention facility]

as a result of having been adjudicated to be a delinquent child for an act which would have been:

[committing]

[or]

[attempting to commit]

[or]

[conspiring to commit]

{rape [IC 35-42-4-1*]}

{or}

{criminal deviate conduct [IC 35-42-4-2*]}

{or}

{child molesting [IC 35-42-4-2*]}

{or}

{child exploitation [IC 35-42-4-4(b)*]}

{or}

{vicarious sexual gratification (including performing sexual conduct in the presence of a minor) [IC 35-42-4-5*]}

{or}

{child solicitation [IC 35-42-4-6*]}

{or}

{child seduction [IC 35-42-4-7*]}

{or}

{sexual misconduct with a minor as a Class A, Class B, or Class C

felony [IC 35-42-4-9*]

{sexual misconduct with a minor as a Class A, Class B, or Class C felony [IC 35-42-4-9*]

unless

- the person is convicted of sexual misconduct with a minor as a Class C felony, and
- the person is not more than
  - four years older than the victim if the offense was committed after June 30, 2007, and

  or

  - five years older than the victim if the offense was committed before July 1, 2007, and
- the sentencing court finds that the person should not be required to register as a sex offender]

{or}

{incest [IC 35-46-1-3*]}

{or}

{sexual battery [IC 35-42-4-8*]}

{or}

{kidnapping [IC 35-42-3-2*], if the victim is less than eighteen (18) years of age, and the person who kidnapped the victim is not the victim's parent or guardian}

{or}

{criminal confinement [IC 35-42-3-3*], if the victim is less than eighteen (18) years of age, and the person who kidnapped the victim is not the victim's parent or guardian}

{or}

{possession of child pornography [IC 35-42-4-4(c)*]}

{or}

{promoting prostitution [IC 35-45-4-4*] as a Class B felony}

{or}

{promotion of human trafficking [IC 35-42-3.5-1(a)(2)*] if the victim is less than eighteen (18) years of age}

{or}

{sexual trafficking of a minor [IC 35-42-3.5-1(b)*]}

{or}

{human trafficking [IC 35-42-3.5-1(c)(3)*] if the victim is less than eighteen (18) years of age}

{or}

{sexual misconduct by a service provider with a detained child [IC 35-44-1-5(c)]}

if committed by an adult

and

had been found by a court by clear and convincing evidence to be likely to repeat an act which if committed by an adult would be:

[committing]

[or]

[attempting to commit]

[or]

[conspiring to commit]

{rape [IC 35-42-4-1*]}

{or}

{criminal deviate conduct [IC 35-42-4-2*]}

{or}

{child molesting [IC 35-42-4-2*]}

{or}

{child exploitation [IC 35-42-4-4(b)*]}

{or}

{vicarious sexual gratification (including performing sexual conduct in the presence of a minor) [IC 35-42-4-5*]}

{or}

{child solicitation [IC 35-42-4-6*]}

{or}

{child seduction [IC 35-42-4-7*]}

{or}

{sexual misconduct with a minor as a Class A, Class B, or Class C felony [IC 35-42-4-9*]

unless

- the person is convicted of sexual misconduct with a minor as a

Class C felony, and

- the person is not more than
  - four years older than the victim if the offense was committed after June 30, 2007, and

  or
  - five years older than the victim if the offense was committed before July 1, 2007, and
- the sentencing court finds that the person should not be required to register as a sex offender]

{or}

{incest [IC 35-46-1-3*]}

{or}

{sexual battery [IC 35-42-4-8*]}

{or}

{kidnapping [IC 35-42-3-2*], if the victim is less than eighteen (18) years of age, and the person who kidnapped the victim is not the victim's parent or guardian}

{or}

{criminal confinement [IC 35-42-3-3*], if the victim is less than eighteen (18) years of age, and the person who kidnapped the victim is not the victim's parent or guardian}

{or}

{possession of child pornography [IC 35-42-4-4(c)*]}

{or}

{promoting prostitution [IC 35-45-4-4*] as a Class B felony}

{or}

{promotion of human trafficking [IC 35-42-3.5-1(a)(2)*] if the victim is less than eighteen (18) years of age}

{or}

{sexual trafficking of a minor [IC 35-42-3.5-1(b)*]}

{or}

{human trafficking [IC 35-42-3.5-1(c)(3)*] if the victim is less than eighteen (18) years of age}

{or}

{sexual misconduct by a service provider with a detained child [IC 35-44-1-5(c)]}.)

Comments

*The statute numbers in this definitional paragraph are for the benefit of the judge, and are not intended to be given to the jury.

The term "offender under I.C. 35-38-1-7.5" used in this instruction is a substitute for the "sexually violent predator" terminology in I.C. 35-38-1-7.5. The instruction avoids using "sexually violent predator" for the same reasons that *Spearman v. State*, 744 N.E.2d 545 (Ind. Ct. App. 2001) urged trial courts not to use the term "serious violent felon" in I.C. 35-47-4-5 trials. If the parties stipulate that the defendant has a prior conviction or adjudication making him an "offender under I.C. 35-38-1-7.5," it is suggested that the court use only the "offender under I.C. 35-38-1-7.5" language and then advise the jury that they are instructed to consider the defendant to be an "offender under I.C. 35-38-1-7.5" because the State and the defendant have stipulated he was.

(Text continued on page 14-206.13)

In many cases, the defendant will be willing to stipulate to the sexually violent predator status, and such offers will usually bind the State. *See Hines v. State*, 801 N.E.2d 634 (Ind. 2004) (adopting U.S. Supreme Court position on defense offers to stipulate legal status which is independent of the charged crime, in *Old Chief v. United States*, 519 U.S. 172, 186-187, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997)).

When the defendant refuses to stipulate to the sexually violent predator status, it will have to be proven to the jury, beyond a reasonable doubt where it is an element of the crime. There are five alternative ways in which a person can be a sexually violent predator under the present Indiana statute. This instruction covers the fourth alternative. To use the instruction, limit it to the particular prior convictions or other status foundations the State alleges as the basis for the status.

The Committee has concluded that the "substantially similar" issue about another jurisdiction's offense is for the court to determine, by judicially noticing the offense's definition and comparing it with the Indiana offense. *See Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance"). In making the similarity determination, the court must look at the definition of the other jurisdiction's offense in effect at the time of the Indiana crime charged in the current prosecution. *See State v. Akins*, 824 N.E.2d 676 (Ind. 2005) (with Indiana OVWI "previous conviction of operating while intoxicated" definition as a conviction "in any other jurisdiction in which the elements of the crime for which the conviction was entered are substantially similar to the elements of the Indiana offense," "the correct comparison is between the Michigan statute under which the defendant was convicted and the Indiana statute at the time of the Indiana offense," not at the time the prior Michigan conviction was entered).

Instr. No. 14.190.5. "Offender Under I.C. 35-38-1-7.5" [Sexually Violent Predator] Based on an Evidentiary Hearing.

I.C. 35-38-1-7.5(e).

A person is an offender under I.C. 35-38-1-7.5 if a court found him/her to be such an offender following an evidentiary hearing under IC 35-38-1-7.5(e).

Comments

The term "offender under I.C. 35-38-1-7.5" used in this instruction is a substitute for the "sexually violent predator" terminology in I.C. 35-38-1-7.5. The instruction avoids using "sexually violent predator" for the same reasons that *Spearman v. State*, 744 N.E.2d 545 (Ind. Ct. App. 2001) urged trial courts not to use the term "serious violent felon" in I.C. 35-47-4-5 trials. If the parties stipulate that the defendant has a prior conviction or adjudication making him an "offender under I.C. 35-38-1-7.5," it is suggested that the court use only the "offender under I.C. 35-38-1-7.5" language and then advise the jury that they are instructed to consider the defendant to be an "offender under I.C. 35-38-1-7.5" because the State and the defendant have stipulated he was.

In many cases, the defendant will be willing to stipulate to the sexually violent predator status, and such offers will usually bind the State. *See Hines v. State*, 801 N.E.2d 634 (Ind. 2004) (adopting U.S. Supreme Court position on defense offers to stipulate legal status which is independent of the charged crime, in *Old Chief v. United States*, 519 U.S. 172, 186-187, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997)).

When the defendant refuses to stipulate to the sexually violent predator status, it will have to be proven to the jury, beyond a reasonable doubt where it is an element of the crime. There are five alternative ways in which a person can be a sexually violent predator under the present Indiana statute. This instruction covers the fifth alternative. To use the instruction, limit it to the particular prior convictions or other status foundations the State alleges as the basis for the status.

Instruction No. 14.190.7. Service Animal.

I.C. 35-46-3-11.5.

The term "service animal" means an animal that a person who is impaired by:

[blindness or any other visual impairment]

[deafness or any other aural impairment]

[a physical disability]

[a medical condition]

relies on for navigation, assistance in performing daily activities, or alert signals regarding the onset of the person's medical condition.

Comments

This instruction is for use in prosecutions of interfering with or mistreating a service animal, Instruction No. 7.544.

Instruction No. 14.191. Shotgun.

I.C. 35-47-1-11.

The word "shotgun" means a weapon designed or re-designed, made or remade, and intended to be fired from the shoulder and designed or re-designed and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

Instruction No. 14.191.5. Social Networking Web Site.

I.C. 35-42-4-12(d).

The term "social networking web site" means an Internet web site, an application, a computer program, or software that:

- facilitates the social introduction between two (2) or more persons
- and requires a person to register or create an account, a username, or a password to become a member of the web site and to communicate with other members
- and allows a member to create a web page or a personal profile
- and provides a member with the opportunity to communicate with another person.

The term does not include an electronic mail program or message board program.

Comments

For use in I.C. 35-42-4-12 sex offender Internet offense prosecutions.

Instruction No. 14.191.7. Solicit.

The term "solicit" means to ask for, to try to obtain something from someone, or to get someone to do something.

Comment

This instruction is optional. It is for use with Instruction No. 5.06, Official Misconduct. The definition for "solicit" here is not from statute. It is a definition which the Committee suggests may be helpful to jurors who may not have a clear understanding of "solicit." The definition is based on a definition found in The New Oxford American Dictionary (2001). Other definitions, as agreed to by the parties, may be substituted.

(Text continued on page 14-206.19)

Instruction No. 14.192. Special Purpose Bus.

I.C. 20-27-2-10.

The term "special purpose bus" is defined by law as follows:

"Special purpose bus" means a motor vehicle:

(1) that is designed and constructed for the accommodation of more than ten (10) passengers;

(2) that:

(A) meets the federal school bus safety requirements under 49 U.S.C. 30125 except the:

(i) stop signal arm required under federal motor vehicle safety standard (FMVSS) no. 131; and

(ii) flashing lamps required under federal motor vehicle safety standard (FMVSS) no. 108;

(B) when owned by a school corporation and used to transport students, complies with the Federal Motor Carrier Safety Regulations as prescribed by the United States Department of Transportation Federal Motor Carrier Safety Administration as set forth in 49 CFR Chapter III Subchapter B; or

(C) when owned by a school corporation and used to transport students, is a motor coach type bus with a capacity of at least thirty (30) passengers and a gross vehicle weight rating greater than twenty-six thousand (26,000) pounds; and

(3) that is used by a school corporation for transportation purposes appropriate under I.C. 20-27-9-5.

Comments

This term is used in the possession of a knife at school offense, Instruction No. 7.89, and in the special definition of "school bus" for that offense, Comments to Instruction No. 14.181.

Instruction No. 14.193. State or Federally Chartered or Federally Insured Financial Institution.

I.C. 35–43–5–8(b).

The term "state or federally chartered or federally insured financial institution" means:

(1) a bank with deposits insured by the Federal Deposit Insurance Corporation;

(2) an institution with accounts insured by the Federal Savings and Loan Insurance Corporation;

(3) a credit union with accounts insured by the National Credit Union Administration Board;

(4) a federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. § 1422); or

(5) a bank, banking association, loan bank, intermediate credit bank for cooperatives, production credit association, land bank association, mortgage association, trust company, savings bank, or other banking or financial institution organized or operating under the laws of the United States or of the state.

Instruction No. 14.194. State or Local Public Benefit.

I.C. 12-32-1-3.

The term "state or local public benefit" means

(1) Except as provided in paragraphs (2) and (3), the term "State or local public benefit" means—

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.

(2) Such term shall not apply—

(A) to any contract, professional license, or commercial license for a nonimmigrant whose visa for entry is related to such employment in the United States, or to a citizen of a freely associated state, if section 141 of the applicable compact of free association approved in Public Law 99-239 or 99-658 [48 USCS § 1681 nts.] (or a successor provision) is in effect;

(B) with respect to benefits for an alien who as a work authorized nonimmigrant or as an alien lawfully admitted for permanent residence under the Immigration and Nationality Act qualified for such benefits and for whom the United States under reciprocal treaty agreements is required to pay benefits, as determined by the Secretary of State, after consultation with the Attorney General; or

(C) to the issuance of a professional license to, or the renewal of a professional license by, a foreign national not physically present in the United States.

(3) Such term does not include any Federal public benefit under section 401(c)[8 USCS § 1611(c)].

The term includes [a postsecondary education award, including a scholarship, a grant, or financial aid] [the resident tuition rate (as determined by the state educational institution].

Comments

For use in prosecutions of false verification of citizenship or immigration status, Instruction No. 5.53.

This definition incorporates 8 U.S.C. 1621.

Instruction No. 14.195. Stepparent.

I.C. 35–42–4–7.

"Stepparent" means an individual who is married to a child's custodial or noncustodial parent and is not the child's adoptive parent.

Instruction No. 14.197. Substance Offense.

I.C. 35–50–2–10(a)(2).

The term "substance offense" means a Class A misdemeanor or a felony in which the possession, use, abuse, delivery, transportation, or manufacture of alcohol or drugs is a material element of the crime.

Instruction No. 14.199. Sudden Heat.

The term "sudden heat" means a mental state which results from provocation sufficient to excite in the mind of the defendant such emotions as anger, rage, sudden resentment, jealousy, or terror sufficient to obscure the reason of an ordinary person, and as such prevents deliberation and premeditation, excludes malice, and renders the defendant incapable of cool reflection prior to acting.

Comments

See Hardin v. State, 273 Ind. 459, 404 N.E.2d 1354 (1980).

Instruction No. 14.201. Support.

I.C. 35–46–1–1.

The term "support" is defined by law as meaning food, clothing, shelter, or medical care.

Instruction No. 14.201.5. Synthetic Identifying Information.

I.C. 35-43-5-1.

The term "synthetic identifying information" means identifying information that identifies:

(1) a false or fictitious person;

(2) a person other than the person who is using the information; or

(3) a combination of persons described under subdivisions (1) and (2).

Comments

"Identifying information" is defined in Instruction No. 14. 117.2.

Instruction No. 14.201.7. Synthetic Drug (Withdrawn).

I.C. 35-41-1-26.3.

This section is withdrawn. To determine if a substance is a "synthetic drug," consult the extensive list of substances in I.C. 35-41-1-26.3. The Committee believes that the court may instruct the jury that a particular substance is a "synthetic drug." It is not necessary for the jury to determine whether a substance is classified as a synthetic drug. The Court does this, as a matter of law. *See Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance").

Instruction No. 14.201.9. Synthetic Drug Lookalike Substance.

I.C. 35-31.5-2-321.5.

"Synthetic drug lookalike substance" means one (1) or more of the following:

(1) A substance, other than a synthetic drug, which any of the factors listed in subsection (c) would lead a reasonable person to believe to be a synthetic drug.

(2) A substance, other than a synthetic drug:

(A) that a person knows or should have known was intended to be consumed; and

(B) the consumption of which the person knows or should have known to be intended to cause intoxication.

[(*use when there is an issue whether the substance is one of the following; then use the particular substance below which is pertinent*) (b) The term "synthetic drug lookalike substance" does not include the following:

(1) Food and food ingredients (as defined in IC 6-2.5-1-20).

(2) Alcohol (as defined in IC 7.1-1-3-4).

(3) A legend drug (as defined in IC 16-18-2-199).

(4) Tobacco.

(5) A dietary supplement (as defined in IC 6-2.5-1-16).

(c) In determining whether a substance is a synthetic drug lookalike substance, the following factors may be considered:

(1) The overall appearance of a dosage unit of the substance, including its shape, color, size, markings or lack of markings, taste, consistency, and any other identifying physical characteristics.

(2) How the substance is packaged for sale or distribution, including the shape, color, size, markings or lack of markings, and any other identifying physical characteristics of the packaging.

(3) Any statement made by the owner or person in control of the substance concerning the substance's nature, use, or effect.

(4) Any statement made to the buyer or recipient of the substance suggesting or implying that the substance is a synthetic drug.

(5) Any statement made to the buyer or recipient of the substance suggesting or implying that the substance may be resold for profit.

(6) The overall circumstances under which the substance is distributed, including whether:

(A) the distribution included an exchange of, or demand for, money

or other property as consideration; and

(B) the amount of the consideration was substantially greater than the reasonable retail market value of the substance the seller claims the substance to be.

(Text continued on page 14-206.25)

Instruction No. 14.202. Telecommunications Device.

I.C. 35–45–13–3.

The term "telecommunications device" means:

(1) a type of instrument, device, machine, or piece of equipment that is capable of transmitting or receiving telephonic, electronic, or radio communications;

(2) a part of an instrument, a device, a machine, or a piece of equipment that is capable of transmitting or receiving telephonic, electronic, or radio communications; or

(3) a computer circuit, a computer chip, an electronic mechanism, or any other component that is capable of facilitating the transmission or reception of telephonic, electronic, or radio communications.

Instr. No. 14.202a. Telecommunications Services.

I.C. 35–45–13–4.

The term "telecommunications services" means a service provided for a charge or compensation to facilitate the origination, transmission, emission, or reception of signs, signals, data, writings, images, sounds, or intelligence of any nature by:

(1) telephone, including cellular or other wireless telephones;

(2) wire;

(3) radio; or

(4) an electromagnetic, a photoelectronic, or a photo-optical system.

Instruction No. 14.202b. Telecommunications Service Provider.

I.C. 35–45–13–5.

The term "telecommunications service provider" means a person or an entity:

(1) providing telecommunications service, including a cellular, paging, or other wireless communications company; or

(2) that, for a fee, supplies the facility, cell site, mobile telephone switching office, or other equipment for a telecommunications service.

Comments

The term "telecommunications service" is defined by law. *See* I.C. 35–45–13–4; Instruction No. 14.202a.

Instr. No. 14.202c. Terrorism.

I.C. 35–41–1–26.5.

"Terrorism" means the unlawful use of force or violence or the unlawful threat of force or violence to intimidate or coerce a government, or all or part of the civilian population.

Instruction No. 14.203 Threat.

I.C. 35–45–2–1(c).

The term "threat" is defined by law as meaning an expression, by words or action, of an intention to:

(1) unlawfully injure the person threatened or another person, or damage property;

(2) unlawfully subject a person to physical confinement or restraint;

(3) commit a crime;

(4) unlawfully withhold official action, or cause such withholding;

(5) unlawfully withhold testimony or information with respect to another person's legal claim or defense, except for a reasonable claim for witness fees or expenses;

(6) expose the person threatened to hatred, contempt, disgrace, or ridicule;

(7) falsely harm the credit or business reputation of the person threatened, or

(8) cause the evacuation of a dwelling, a building, another structure, or a vehicle.

Instr. No. 14.203a. Threatens.

I.C. 35–45–9–2.

The term "threatens" includes a communication made with the intent to harm a person or the person's property, or any other person or the property of another person.

Instruction No. 14.204. Timber.

I.C. 35–43–8–1.

The term "timber" includes standing or felled trees and logs that can be used for:

(1) sawing or processing into lumber for building or structural purposes;

(2) posts, poles, bolts, pulpwood, or cordwood; or

(3) the manufacture of wood products.

Instr. No. 14.204.5. Torture.

I.C. 35-46-3-0.5.

The term "torture" means:

[to inflict extreme physical pain or injury on an animal with the intent of increasing or prolonging the animal's pain]

[or]

[to administer poison to a domestic animal (as defined in C 35-46-3-12(d)) or expose a domestic animal to a poisonous substance with the intent that the domestic animal ingest the substance and suffer harm, pain, or physical injury].

Instruction No. 14.204a. Title Insurance Agent.

I.C. 35–43–9–4.

As used in the statutes on conversion or misappropriation of title insurance escrow funds, I.C. 35–43–9, the term "title insurance agent" means a person who holds a limited insurance representative's license issued under IC 27–1–15.5–3(a)(4) and disburses funds from a title insurance escrow account to a party in connection with a residential real property transaction.

(Text continued on page 14-207)

Comments

The terms "party," "person" and "residential real property transaction" used in this definition are defined by law. See I.C. 35–43–9–1, I.C.35–43–9–2 and I.C. 35–43–9–3; Instruction Nos. 14.146, 14.154 and 14.178.

Instruction No. 14.204b. Title Insurance Escrow Account.

I.C. 35–43–9–5.

As used in the statutes on conversion or misappropriation of title insurance escrow funds, I.C. 35–43–9, the term "title insurance escrow account" means an account in which written instruments, money, or other items are deposited and held in escrow or trust for disbursement to a party in connection with a residential real property transaction upon the performance of a specified condition or the happening of a certain event.

Comments

The terms "party" and "residential real property transaction" used in this definition are defined by law. See I.C. 35–43–9–1 and I.C. 35–43–9–3; Instruction Nos. 14.146 and 14.178.

Instruction No. 14.204c. Title Insurer.

I.C. 35–43–9–6.

As used in the statutes on conversion or misappropriation of title insurance escrow funds, I.C. 35–43–9, the term "title insurer" means a person holding a valid certificate of authority issued under IC 27–7–3–6.

Comments

The term "person" used in this definition is defined by law. See I.C. 35–43–9–1; Instruction No. 14.146.

Instruction No. 14.205. Tumultuous Conduct.

I.C. 35-45-1-1.

The term "tumultuous conduct" is defined by law as meaning conduct that results in, or is likely to result in, serious bodily injury to a person or substantial damage to property.

Instruction No. 14.207. Ultimate User.

I.C. 35–48–1–27.

The term "ultimate user" means a person who lawfully possesses a controlled substance for the person's own use, for the use of a member of the person's household, or for administering to an animal owned by the person or by a member of the person's household.

Instruction No. 14.209. Unauthorized Control Over Property.

I.C. 35-45-4-1(b).

As defined by law a person's control over the property of another person is "unauthorized" if it is exerted:

(1) without the other person's consent;

(2) in a manner or to an extent other than that to which the other person has consented;

(3) by transferring or encumbering other property while failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of that other property;

(4) by creating or confirming a false impression in the other person;

(5) by failing to correct a false impression that the person knows is influencing the other person, if the person stands in a relationship of special trust to the other person;

(6) by promising performance that the person knows will not be performed;

(7) by expressing an intention to damage the property or impair the rights of any other person; or,

(8) by transferring or reproducing recorded sounds, without consent of the owner of the master recording, with intent to distribute the reproductions for a profit.

Instruction No. 14.211. Unconscionable Home Improvement Contract.

I.C. 35–43–6–8, I.C. 35–43–6–9.

A home improvement contract is "unconscionable" if an unreasonable difference exists between the fair market value of the services, materials, and work performed or to be performed and the home improvement contract price.

If you find that the home improvement contract price was more than four (4) times greater than the fair market value of the services, materials, or work performed or to be performed, you may consider this difference between contract price and fair market value as evidence that the home improvement contract was unconscionable.

Comments

I.C. 35–43–6–9 provides that a contract price more than four times greater than fair market value is "prima facie evidence of an unconscionable home improvement contract."

The terms "fair market value of home improvement," "home improvement contract" and "home improvement contract price" are defined by law. See I.C. 35–43–6–10, I.C. 35–43–6–4 and I.C. 35–43–6–5; Instruction Nos. 14.83, 14.109 and 14.111.

Instruction No. 14.213. Unlawful Assembly.

I.C. 35–45–1–1.

The term "unlawful assembly" is defined by law as meaning an assembly of five (5) or more persons whose common object is to commit an unlawful act, or a lawful act by unlawful means. Prior concert is not necessary to form an unlawful assembly.

Instruction No. 14.214. Unlawful telecommunications device.

I.C. 35–45–13–6.

The term "unlawful telecommunications device" means a telecommunications device that:

(1) is capable of; or

(2) has been altered, modified, programmed, or reprogrammed, alone or in conjunction with another access device or other equipment, to render the telecommunications device capable of,

acquiring or facilitating the acquisition of an electronic serial number, a mobile identification number, or a personal identification number of any telecommunications service without the consent of a telecommunications service provider.

Comments

The terms "telecommunications device," "telecommunications services," and "telecommunications service provider" are defined by law. See I.C. 35–45–13–3, I.C. 35–45–13–4, and I.C. 35–45–13–5; Instruction Nos.14.202, 14.202a, and 14.202b.

Instruction No. 14.215. Utter.

I.C. 35–41–1–27.

The term "utter" is defined by law as meaning to issue, authenticate, transfer, publish, deliver, sell, transmit, present, or use.

Instruction No. 14.215.10. Valuable Metal.

I.C. 25-37.5-1-1.

The term "valuable metal" means any product made of metal that readily may be resold. The term includes metal bossies and small component motor vehicle parts. The term does not include a beverage can.

Instruction No. 14.215a. Victim.

I.C. 35–45–19–4.

The term "victim" is defined by law as meaning a person who is the object of stalking.

Instruction No. 14.215a1. Vending Machine.

I.C. 35–43–4–7.

The term "vending machine" is defined by law as meaning a mechanical or an electronic device or a receptacle designed:

(1) To receive a coin, bill, or token made for that purpose; and

(2) To automatically dispense goods, wares, merchandise, or other property in return for the insertion or deposit of a coin, bill, or token.

(Text continued on page 14-223)

Instruction No. 14.216. Vehicle.

I.C. 9–13–2–196.

The term "vehicle" means a device for transportation by land or air.

Instruction No. 14.216a. Weapon of Mass Destruction.

I.C. 35–41–1–29.4.

"Weapon of mass destruction" means any chemical device, biological device or organism, or radiological device that is capable of being used for terrorism.

Comments

The term "terrorism" is defined by statute. See I.C. 35–41–1–26.5; Instruction No. 14.202c.

Instruction No. 14.217. Women-Owned Business Enterprise.

I.C. 5–16–6.5–3.

The term "women-owned business enterprise" is defined by law as meaning a business that is at least fifty-one percent (51%) owned and controlled by a woman or women.

Comments

The term "owned and controlled" is defined by law. See I.C. 4–13–16.5–1; Instruction No. 14.145.

Instruction No. 14.219. Written Instrument.

I.C. 35–43–5–1.

"Written instrument" means a paper, document, or other instrument containing written matter and includes money, coins, tokens, stamps, seals, credit cards, badges, trademarks, medals, retail sales receipts, labels or markings (including a universal product code (UPC) or another product identification code), or other objects or symbols of value, right, privilege, or identification.

Instruction No. 14.221. Youth Program Center.

I.C. 35–41–1–29.

The term "youth program center" means a building or structure, or the real property on which it stands, which on a regular basis provides recreational, vocational, academic, social, or other programs or services for persons less than eighteen (18) years of age. The term does not include school property.

CHAPTER 15

BIFURCATED TRIALS

SYNOPSIS

(Text continued on page 15-5)

INTRODUCTION

This chapter provides suggested forms to deal with the necessity of separating a criminal trial into two or more distinct phases with verdicts after each phase.

Bifurcation may be required by statute (death penalty, habitual offender) or by case law. The general rule against admitting prior bad acts or criminal convictions to prove the accused committed the offense charged is consistent with the fundamental tenet that a person be convicted solely on evidence relevant to the issues in the case, not criminal predisposition.

There are exceptions to this general rule, but this chapter deals only with those situations in which the Judge is faced with the necessity of bifurcation. Our definition of necessity is that a bifurcated trial is mandatory when required by statute and in every other case when enhancement of the penalty requires evidence of conviction or commission of another crime which normally would be inadmissible in the state's case in chief.

Instruction No. 15.01. PRELIMINARY INSTRUCTION No. 1: Life Imprisonment Without Parole/ Death Penalty

As to the first phase of this trial, the evidence has concluded and you have found the Defendant guilty of _____ (list convictions from guilt phase here). In this phase of the trial, the State of Indiana is seeking a recommendation from you that the Defendant [be sentenced to life imprisonment without parole] or [receive the death penalty]. In order to seek this penalty, the State of Indiana was required to file a separate Charging Information which requested a recommendation from the jury to the Judge that [the sentence of life imprisonment without parole] or [the death penalty] be imposed. The allegations contained in said charging Information are as follows:

[*Insert charging information facts and alleged aggravating circumstances here.*]

Instruction No. 15.02. PRELIMINARY INSTRUCTION No. 2: Life Imprisonment Without Parole/Death Penalty

In the second phase of this trial, the burden is upon the State of Indiana to prove to each of you beyond a reasonable doubt at least one aggravating circumstance as set forth in the Charging Information wherein the State has requested a recommendation from you that the Defendant receive [the sentence of life imprisonment without parole] or [the death penalty]. You should consider both aggravating and mitigating circumstances and recommend to the Judge whether the Defendant should receive [life imprisonment without parole or be sentenced to a term of years as would be determined by the judge] or [the death penalty, life imprisonment without parole, or be sentenced to a term of years as would be determined by the judge].

You may consider all the evidence introduced during the first phase of the trial together with all evidence introduced during this phase of the trial in determining your recommendation. Do not consider any offered evidence that the Court did not allow into evidence or that the Court ordered stricken from the record. In fact, such matters are to be treated as if you had never heard of them.

You have previously been instructed by me as to the rules of law regarding the burden of proof, judging the credibility of witnesses, and the manner of weighing the testimony. You have also been instructed as to definitions, including the definition of reasonable doubt. Those rules and definitions also apply in this phase of the trial.

Instruction No. 15.03. PRELIMINARY INSTRUCTION No. 3: Life Imprisonment Without Parole/Death Penalty

You are not permitted to consider any circumstances as weighing in favor of the sentence of [life imprisonment without parole] or [death or life imprisonment without parole] other than those specifically charged by the State of Indiana in the Charging Information. Again, the charged aggravating circumstances here are:

[*List here all charged aggravating circumstances.*]

Instruction No. 15.04. PRELIMINARY INSTRUCTION No. 4: Life Imprisonment Without Parole/Death Penalty

(The Committee suggests that despite the last paragraph in Preliminary Instruction No. 2 that any definitional instructions be read at this time such as reasonable doubt, the culpability instruction, etc. as are applicable in the case)

Instruction No. 15.05. PRELIMINARY INSTRUCTION No. 5: Life Imprisonment Without Parole/Death Penalty

For any of you to find that a mitigating circumstance exists, you must find that it has been proven by a preponderance of the evidence. A preponderance of the evidence means that it is only necessary to prove that a fact is more probably true than not true.

Instruction No. 15.06. PRELIMINARY INSTRUCTION No. 6: Life Imprisonment Without Parole/Death Penalty

A mitigating circumstance can be anything about the Defendant and/or the offense which any one of you believes should be taken into account in tending to support a sentence less than [life imprisonment without parole] or [death or life imprisonment without parole]. Mitigating circumstances are not being offered as an excuse or justification for the crime you have found that the Defendant committed. Instead, they are circumstances relating to the Defendant's age, character, education, environment, mental state, life, and background, and/or any aspect of the offense itself and the Defendant's involvement in it, which any one of you believes weighs against a sentence of [life imprisonment without parole] or [death or life imprisonment without parole].

Mitigating circumstances are different than aggravating circumstances in a number of ways. First, mitigating circumstances need not be proven beyond a reasonable doubt like aggravating circumstances must be. Second, your finding that any mitigating circumstance exists does not have to be unanimous. Each juror must consider and weigh any mitigating facts he or she finds to exist without regard to whether other jurors agree with that determination. Lastly, unlike aggravating circumstances, there are no limits on what facts any of you may find as mitigating. Mitigating circumstances may be established by any evidence introduced in the first or second phase of the trial by the State or the defense.

Instruction No. 15.07. PRELIMINARY INSTRUCTION NO. 7: Life Imprisonment Without Parole/Death Penalty

You may recommend the sentence of [life imprisonment without parole] or [death or life imprisonment without parole] only if you unanimously find:

1. That the State of Indiana has proven beyond a reasonable doubt that at least one of the charged aggravating circumstances exists; and
2. That any mitigating circumstance or circumstances that exist are outweighed by the charged and proven aggravating circumstance or circumstances.

Comments

The beyond-a reasonable-doubt standard is not required to be used to determine whether the aggravating factor or factors outweigh mitigating factors. *Ritchie v. State*, 809 N.E.2d 258 (Ind. 2004). *See also Pruitt v. State*, 834 N.E.2d 90 (Ind. 2005) (*Blakely v. Washington* holding does not require that the jury finding that aggravating circumstances outweigh the mitigating factors must be beyond a reasonable doubt).

Instruction No. 15.08. PRELIMINARY INSTRUCTION No. 8: Life Imprisonment Without Parole/Death Penalty

Your recommendation is an important part of the sentencing process. The Judge must follow your sentencing recommendation.

(The Committee recommends that you do not instruct the jury that if they are unable to reach a sentencing recommendation that they will be discharged and the sentencing will proceed as if the hearing had been to the Court alone. The concern with such an instruction is that the jury may use this instruction to diminish the role of the jury in the sentencing process. The Committee recommends that, if the jury asks the Judge during deliberations what will happen if they are unable to agree to a recommendation, you instruct them how the case will proceed.)

Instruction No. 15.09. PRELIMINARY INSTRUCTION No. 9: Life Imprisonment Without Parole/Death Penalty

Nothing that I say or do during this phase of the trial is intended as a suggestion of what facts you should find or what your recommendation for sentencing should be. Each of you must determine the facts and make your sentencing recommendation accordingly.

Instruction No. 15.10. FINAL INSTRUCTION No. 1: Life Imprisonment Without Parole/Death Penalty

You are to consider all the instructions as a whole and are to regard each with the other instructions given to you by the Court. Do not single out any certain sentence, or any individual point or instruction and ignore the others.

Instruction No. 15.11. FINAL INSTRUCTION No. 2: Life Imprisonment without Parole/Death Penalty

Under the Constitution of Indiana the jury is given the right to decide both the law and the facts. In fulfilling this duty, you are to apply the law as you actually find it and you are not to disregard it for any reason. The instructions from the Judge are your best source in determining what the law is.

Instruction No. 15.12. FINAL INSTRUCTION No. 3: Life Imprisonment Without Parole/Death Penalty

Before you may consider recommending [life imprisonment without parole] or [death or life imprisonment without parole], you must unanimously find that the State has proven beyond a reasonable doubt:

1. [*recite first aggravating circumstance*], or
2. [*recite second aggravating circumstance*], or

[*continue to enumerate each alleged aggravator joined by the word "or"*]

If you do not so unanimously find, you must recommend against [life imprisonment without parole] or [death or life imprisonment without parole].

You are not permitted to consider any circumstances as weighing in favor of the sentence of [life imprisonment without parole] or [death or life imprisonment without parole] other than the aggravating circumstances specifically charged by the State in the Charging Information.

The Court will provide to you verdict forms as to each aggravating circumstance and you must sign each form to which there is unanimous agreement.

Instruction No. 15.13. FINAL INSTRUCTION No. 4: Life Imprisonment Without Parole/Death Penalty

If you unanimously find at least one charged aggravating circumstance has been proven beyond a reasonable doubt, you must next consider the mitigating circumstances and then weigh the aggravating circumstance(s) against the mitigating circumstance(s). You may only consider recommending the sentence of [life imprisonment without parole] [or] [death or life imprisonment without parole] if you unanimously find that the aggravating circumstance(s) outweigh the mitigating circumstance(s).

Even if you unanimously find that the State has met its burden of proof as to the existence of at least one charged aggravating circumstance and that the aggravating circumstance(s) outweigh the mitigating circumstance(s), the law allows you to recommend that the judge impose a term of years instead of the sentence of [life imprisonment without parole] or [death or life imprisonment without parole].

The court will provide you with a verdict form as to the finding that you must make in regard to whether the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s). Further, the court will provide you with a verdict form to complete in regard to your sentencing recommendation.

Comments

It has been held that the determination that the aggravating factor or factors outweigh the mitigating factors does not have to be made beyond a reasonable doubt. *Covington v. State*, 842 N.E.2d 345, 351 (Ind. 2006).

Instruction No. 15.14. FINAL INSTRUCTION No. 5: Life Imprisonment Without Parole/Death Penalty

(The Committee suggests that despite the last paragraph in Preliminary Instruction No. 2 that any definitional instructions be read at this time such as reasonable doubt, culpability instruction, etc., as are applicable in the case).

Instruction No. 15.14a. FINAL INSTRUCTION No. 6: Life Imprisonment Without Parole/Death Penalty

For any of you to find that a mitigating circumstance exists, you must find that it has been proven by a preponderance of the evidence. A preponderance of the evidence means that it is only necessary to prove that a fact is more probably true than not true.

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Instruction No. 15.14b. FINAL INSTRUCTION No. 7: Life Imprisonment Without Parole/Death Penalty

The law allows you to consider both statutory and non-statutory mitigating circumstances. The applicable statutory mitigating circumstances in this case that the Defendant now asks you to consider are as follows:

[The Committee suggests that you allow the defense to state on the record exactly which statutory circumstances they want inserted here whether you agree or not that there is any evidence of that factor.]

You should consider these statutory circumstances as well as any non-statutory circumstances in determining the mitigating factors.

Instruction No. 15.14c. FINAL INSTRUCTION No. 8: Life Imprisonment Without Parole/Death Penalty

A mitigating circumstance can be anything about the Defendant and/or the offense which any one of you believes should be taken into account in tending to support a sentence less than [life imprisonment without parole] or [death or life imprisonment without parole]. Mitigating circumstances are not being offered as an excuse or justification for the crime you have found that the Defendant committed. Instead, they are circumstances relating to the Defendant's age, character, education, environment, mental state, life, and background, and/or any aspect of the offense itself and the Defendant's involvement in it, which any one of you believes weighs against a sentence of [life imprisonment without parole] or [death or life imprisonment without parole].

Mitigating circumstances are different than aggravating circumstances in a number of ways. First, mitigating circumstances need not be proven beyond a reasonable doubt like aggravating circumstances must be. Second, a finding of any mitigating circumstance need not be unanimous. Each juror must consider and weigh any mitigating facts he or she finds to exist without regard to whether other jurors agree with that determination. Lastly, unlike aggravating circumstances, there are no limits on what facts any of you may find as mitigating. Mitigating circumstances may be established by any evidence introduced in the first or second phase of the trial by the State or the defense.

Instruction No. 15.14d. FINAL INSTRUCTION No. 9: Life Imprisonment Without Parole/Death Penalty

You should use your individual judgment to determine if the State has proven that the aggravating circumstance(s) outweigh any mitigating circumstance(s). This is a weighing and balancing process for each individual juror. The State is not required to prove beyond a reasonable doubt that the aggravating circumstance(s) weigh greater to meet its burden. The Court will provide you with verdict forms.

Comments

The Committee considered the language in *Ring v. Arizona*, U.S. _____, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), that suggests that the burden of proof is on the State to prove that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. However, since our statute does not require such a burden, and since at the time of printing this supplement there were not any Indiana cases that required such proof, the Committee did not recommend that this burden be included. If the issue is raised by the defense, and you want an appeal proof instruction, you should consider including the burden of proof beyond a reasonable doubt in the weighing instruction. Please make sure you are current on the status of the case law at the time you give this instruction, and alter it accordingly. The Committee's concerns with adding the language from *Ring v. Arizona* are that Indiana's statutory scheme is not the same as Arizona's and that *Ring* does not specifically hold that a statute is unconstitutional if the beyond a reasonable doubt burden is not required.

Instruction No. 15.14e. FINAL INSTRUCTION NO 10: Life Imprisonment Without Parole/Death Penalty

[During the first phase of the trial, the Defendant was convicted of _____ (list all murders and felony murders the Defendant was convicted of). In Indiana, the murder [and felony murder] counts for the same victim will merge for the purposes of sentencing if a term of years is imposed.] If [life imprisonment without parole] or [the death penalty or life imprisonment without parole] is not imposed, the sentence for murder is a fixed sentence that ranges from forty-five (45) years to sixty-five (65) years.

In addition, during the first phase of the trial, the Defendant was also convicted of (*list all other crimes*). At sentencing, the Judge must impose a specific number of years within the available ranges for each crime the Defendant was convicted of. The Judge can order that these sentences be served concurrently, meaning at the same time, or consecutively, meaning served one after the other. Based upon the statutory penalties for each crime the Defendant was convicted of, if a term of years is imposed, the Judge could impose a sentence on the Defendant ranging from a minimum of forty-five (45) years if the sentences are ordered served concurrently to a maximum of _____ years if the sentences are ordered served consecutively.

Instruction No. 15.14f. FINAL INSTRUCTION No. 11: Life Imprisonment Without Parole/Death Penalty

The current law in Indiana will allow the Defendant, if he is sentenced to a fixed term of years, to earn credit for good behavior to apply against his sentence, with a maximum allowable credit of fifty percent (50%) of the sentence imposed by the Judge.

Instruction No. 15.14g. FINAL INSTRUCTION No. 12: Life Imprisonment Without Parole/Death Penalty

In Indiana, if the Defendant is sentenced to life imprisonment without parole, he will not ever be eligible for parole or any form of credit time, and he will spend the rest of his life in prison.

Instruction No. 15.14h. FINAL INSTRUCTION NO 13: Life Imprisonment Without Parole/Death Penalty

The Governor of Indiana has the power, under the Indiana Constitution, to grant a reprieve, commutation, or pardon to a person convicted and sentenced for murder. A pardon completely eliminates a conviction and sentence. A commutation reduces the sentence, for example by changing a death sentence to one for life without parole or for a term of imprisonment. A reprieve is a temporary postponement of the execution of a sentence. The Indiana Constitution leaves it entirely up to the discretion of the Governor when and how to use this power.

Instruction No. 15.14i. FINAL INSTRUCTION No. 15: Life Imprisonment Without Parole/Death Penalty

You are to consider both aggravating and mitigating circumstances and recommend whether [life imprisonment without parole] or [the death penalty or life imprisonment without parole] or a term or years should be imposed. You may consider all the evidence introduced in the first phase of the trial together with all the evidence introduced in this phase in making your determination. The law requires that your sentencing recommendation must be followed by the Judge.

If you find that the State failed to prove beyond a reasonable doubt the existence of at least one charged aggravating circumstance, you must return the verdict form that so finds, and you must return the verdict form that recommends that the Judge impose a term of years at sentencing.

If you find that the State did prove beyond a reasonable doubt the existence of at least one charged aggravating circumstance, you must return the verdict form that so finds. However, if you further find that any mitigating circumstance(s) are not outweighed by the aggravating circumstance(s), you must return that verdict form, and you must return the verdict form that recommends that the Judge impose a term of years at sentencing.

If you find that the State did prove beyond a reasonable doubt the existence of at least one charged aggravating circumstance, you must return that verdict form. If you further find that any mitigating circumstances are outweighed by the aggravating circumstance(s), you must return that verdict form, and you may make one of [two] or [three] possible sentencing recommendations and you must return the verdict form that states your recommendation. You may return the verdict form recommendation that the Defendant be sentenced to [life imprisonment without parole or the verdict form recommendation that the judge impose a term of years at sentencing] or [the death penalty, the verdict form recommendation that the defendant be sentenced to life imprisonment without parole, or the verdict form recommendation that the judge impose a term of years at sentencing].

Any findings you enter in a verdict form must be unanimous. Do not enter any findings or sign any verdict form to which there has not been a unanimous agreement.

Instruction No. 15.14j. FINAL INSTRUCTION No. 16: Life Imprisonment Without Parole/Death Penalty

To return a verdict, each of you must agree to it.

Each of you must decide the case for yourself, but only after considering the evidence with the other jurors. It is your duty to consult with each other. You should try to agree on a verdict, if you can do so without compromising your individual judgment. Do not hesitate to re-examine your own views and change your mind if you believe you are wrong. But do not give up your honest belief just because the other jurors may disagree, or just to end the deliberations. After the verdict is read in Court, you may be asked individually whether you agree with it.

When you begin, select one of your members as foreperson to manage the deliberations.

No one will be allowed to hear your discussions and no recording will be made of what you say. The bailiff is available to assist you with personal needs, but cannot answer any questions about the case.

Any question for [the Court] must be in writing and given to the bailiff. [The Court often is] not allowed to answer your questions, except by re-reading all of the jury instructions. Because [the Court has] given you those instructions, you may be able to answer your questions by reviewing them.

If there is a break in deliberations, do not talk about this case among yourselves or with anyone else.

[The Court is] submitting to you forms of possible verdicts you may return. When you retire to the jury room to begin your deliberations, the jury foreperson should preside over your deliberations and must sign and date the findings and recommendation to which you all agree. The foreperson must return all verdict forms, signed or unsigned. After you make your decision, you are under no obligation to discuss it or the reasons for it with anyone.

Instruction No. 15.15. Recidivist Preliminary and Final.

Preliminary:

Normally, after reaching a verdict, your duty as jurors would be over. However, in this case, the State has filed an additional count[s] alleging that the Defendant has [a] prior unrelated conviction[s].

Under Indiana law, you could not be told about the additional count[s] until now.

In this part of the trial the attorneys will again have an opportunity to make opening statements. Then witnesses will be called to testify. When the evidence is completed, the attorneys may make final statements. Then I will read final instructions.

You may consider all of the evidence presented in the first part of the trial [except evidence limited for a particular purpose].

You were instructed earlier about the burden of proof, reasonable doubt, the presumption of innocence, the credibility of witnesses, and how to evaluate the evidence. Those instructions apply here as well.

Also as previously instructed, under the Constitution of Indiana you have the right to determine both the law and the facts. The Court's/my instructions are your best source in determining the law.

If you realize you know something about the case that did not come from this trial, or you know a witness or the Defendant, you must inform the bailiff privately at once.

Final:

As previously instructed, under the Constitution of Indiana you have the right to determine both the law and the facts. The Court's/my instructions are your best source in determining the law.

The Court has also already instructed you about how to deliberate, the burden of proof, the credibility of witnesses, the issues for trial, and the manner of weighing the evidence.

As you already have copies of these instructions, these instructions will not be re-read to you, but you will keep them in mind during your deliberations.

Comment:

If more than one enhancement use a separate instruction for each count.

(Text continued on page 15-35)

Instruction No. 15.17. Habitual Offender — Definition — Phase II.

I.C. 35-50-2-8.

An additional count of the [information] [indictment] in this case charges the Defendant with being a habitual offender. This count reads as follows:

Comments

A "prior unrelated felony conviction" is defined by Instruction No. 15.29.

Instruction No. 15.19. Habitual Offender — Elements — Phase II.

I.C. 35-50-2-8.

The State may seek to have a person sentenced as a habitual offender for any felony by proving that the person has accumulated two (2) prior unrelated felony convictions.

You may find the Defendant to be a habitual offender only if the State has proven each of the following facts beyond a reasonable doubt

The Defendant:

1. committed and was convicted and sentenced for a felony, [*set out first predicate offense*] and;
2. later committed and was convicted and sentenced for another felony, [*set out second predicate offense*] and;
3. later committed Count _____[and/or Count _____ (name felony(s) of which Defendant was convicted in Phase I.)

If the State failed to prove each of these facts beyond a reasonable doubt, you must find the Defendant is not a habitual offender.

Comments

Preliminary Pattern Instruction 1.03 on the jury's right to determine the law and the facts should be given with this instruction. A defendant has the right to have the instruction on the jury's right to determine the law and the facts not just in final instructions in the guilt phase but also in the habitual offender phase of trial. *Shouse v. State*, 849 N.E.2d 650 (Ind. Ct. App. 2006).

"Prior unrelated felony conviction" is defined by Instruction No. 15.29.

"Felony" is defined by Instruction No. 14.85. This "felony" instruction will rarely be needed, given the holding that, in a habitual offender proceeding, whether a prior offense is a felony is an issue of law for the court, not an issue of fact for the jury. *McCollum v. State*, 582 N.E.2d 804 (Ind. 1991).

Note: While element three of the instruction states the State must prove the Defendant committed the offense, the conviction in the first phase of the trial conclusively establishes the commission of the offense. And it has been held that commission of the

underlying offense is "an issue which had been decided in the case, was the law of the case, and was totally outside the realm of the second assembled jury." *Gilliam v. State*, 563 N.E.2d 94 (Ind. 1990). But, in the event an instruction is deemed necessary the Committee recommends the following:

> If the State has proven that the Defendant was convicted and sentenced for an offense, then the State has proven that the Defendant committed the offense.

Instruction No. 15.21a. Criminal Gang Enhancement.

I.C. 35-50-2-15.

An additional count of the information in this case charges the Defendant with criminal gang enhancement. This count reads as follows:

Instruction No. 15.21b. Criminal Gang Enhancement.

I.C. 35-50-2-15.

You may find the criminal gang enhancement only if the State has proven each of the following facts beyond a reasonable doubt:

The Defendant

1. knowingly or intentionally
2. committed a felony offense, [*name offense from Phase I*], and
3. was a member of a criminal gang while committing the felony offense, and
4. committed the felony offense at the direction of or in affiliation with a criminal gang.

If the State failed to prove each of these facts beyond a reasonable doubt, you must find the State has not proven the facts necessary for criminal gang enhancement.

Comment

The term "criminal gang" is defined by law. *See* I.C. 35-50-2-1.4; Instruction No. 14.41a.

Instruction No. 15.27. Habitual Substance Offender—Elements—Phase II.

I.C. 35-50-2-10.

The State may seek to have a person sentenced as an habitual substance offender for any substance offense by proving that the person has accumulated two (2) prior unrelated substance offense convictions.

You may find the Defendant to be an habitual substance offender only if the State has proven each of the following facts beyond a reasonable doubt:

The Defendant

1. committed and was convicted of and sentenced for a substance offense, [*set out first predicate offense*] and;
2. later committed and was convicted and sentenced for a substance offense, [*set out second predicate offense*] and;
3. later committed Count _____ [the substance offense charged in Phase I].

If the State failed to prove each of these facts beyond a reasonable doubt, you must find the Defendant is not an habitual substance offender.

Comments

The terms "drug" and "substance offense" are defined by law. See I.C. 35-48-1-16 and I.C. 35-50-2-10(a)(2); Instruction Nos. 14.71 and 14.197.

"Prior unrelated substance offense conviction" is defined in Instruction No. 15.29.

(Text continued on page 15-41)

Instruction No. 15.29. Prior Unrelated [Substance] Conviction — Definition — Phase II.

To be unrelated, a [felony] [substance offense] must be committed after the Defendant has already committed and been sentenced for another [felony] [substance offense].

Instruction No. 15.33. Incorporation of Evidence

You may consider all of the evidence presented in the first phase of the trial [except evidence limited for a particular purpose].

Comments

This instruction is based on *Knuckles v. State*, 549 N.E.2d 85 (Ind. Ct. App. 1990) ("Evidence admitted during the guilt phase is before the fact finder during the habitual offender phase," finding evidence of habitual sequence sufficient because evidence of date of offense being tried was presented in guilt phase).

Instruction No. 15.35. Habitual Offender — Pardon or Reversal

I.C. 35-50-2-8.

If you find that one of the felony convictions alleged has been set aside or you find that the Defendant was pardoned for one of the alleged convictions, you cannot consider that conviction in determining whether the Defendant is an habitual offender.

The Defendant has the burden to prove that a conviction has either been pardoned or set aside.

Comments

The burden of proof that a prior conviction has either been pardoned or set aside is on the Defendant, and if there is no evidence that a prior conviction is invalid no instruction on the subject need be given. *King v. State*, 531 N.E.2d 1154 (Ind. 1988).

Instruction No. 15.37. Repeat Sex Offender.

I.C. 35-50-2-14.

The State is seeking to have the Defendant sentenced as a repeat sexual offender by proving that the Defendant had accumulated one prior unrelated felony conviction [under I.C. 35-42-4-1 through I.C. 35-42-4-9 or I.C. 35-46-1-3] [for an offense committed in another jurisdiction that is substantially similar to a sex offense under I.C. 35-42-4-1 through I.C. 35-42-4-9 or IC 35-46-1-3] before the Defendant committed the offense of (*name Indiana offense*) in Count _____ of which the Defendant was convicted in Phase I of this trial.

You may find the Defendant to be a repeat sexual offender only if the State has proven each of the following facts beyond a reasonable doubt:

1. The Defendant;
2. was convicted and sentenced for

   [the Indiana felony sex offense of (*name alleged offense under I.C. 35-42-4-1 through I.C. 35-42-4-9 or I.C. 35-46-1-3*)]

   [or]

   [the (*name jurisdiction*) offense of (*name alleged offense in the other jurisdiction*), an offense which the court instructs you was substantially similar to the Indiana offense under I.C. (*insert statutory citation*) of (*name Indiana sex offense*)];
3. and afterwards committed the (*name Indiana offense*) in Count _____ of which Defendant was convicted in Phase I of this trial.

If the State failed to prove each of these facts beyond a reasonable doubt, you must find the Defendant is not a repeat sexual offender.

Comments

Preliminary Pattern Instruction 1.03 on the jury's right to determine the law and the facts should be given with this instruction. *See Shouse v. State*, 849 N.E.2d 650 (Ind. Ct. App. 2006) (defendant has the right to have the instruction on the jury's right to determine the law and the facts not just in final instructions in the guilt phase but also in the habitual offender phase of trial).

The Committee has concluded that the "substantial similarity"

issue about the other jurisdiction's offense is one for the court to determine, by judicially noticing the offense's definition and comparing it with the Indiana offense. *See Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance"). In making the similarity determination, the court must look at the definition of the other jurisdiction's offense in effect at the time of the Indiana battery charged in the current prosecution. *See State v. Akins*, 824 N.E.2d 676 (Ind. 2005) (with Indiana OVWI "previous conviction of operating while intoxicated" definition as a conviction "in any other jurisdiction in which the elements of the crime for which the conviction was entered are substantially similar to the elements of the Indiana offense," "the correct comparison is between the Michigan statute under which the defendant was convicted and the Indiana statute at the time of the Indiana offense," not at the time the prior Michigan conviction was entered).

The Committee also notes that whether a prior offense is a felony is an issue of law for the trial court, not an issue of fact for the jury. *McCollum v. State*, 582 N.E.2d 804 (Ind. 1991).

Instruction No. 15.38. Termination of Human Pregnancy.

I.C. 35-50-2-16.

The State is seeking to have the Defendant sentenced as a person who terminated a human pregnancy while committing or attempting to commit murder.

You may find the Defendant to be a person who terminated a human pregnancy while committing or attempting to commit murder only if the State has proven each of the following facts beyond a reasonable doubt:

1. The Defendant
2. while [committing] [attempting to commit] murder
3. caused the termination of a human pregnancy.

The State does not have to prove that the Defendant had knowledge, or should have had knowledge, that the victim was pregnant or that the Defendant intended to cause the termination of a human pregnancy.

If the State failed to prove each of facts 1., 2. and 3. above beyond a reasonable doubt, you cannot find the Defendant terminated a human pregnancy while [committing] [attempting to commit] murder.

Instruction No. 15.41. Auto Theft C Receiving Stolen Auto Parts — Elements — Phase II.

I.C. 35-43-4-2.5(b).

I.C. 35-43-4-2.5(c).

The State has filed an additional count alleging that the Defendant had been convicted of Auto Theft before he committed the offense charged in Count _____. A person who commits [auto theft] [receiving stolen auto parts] when he/she has a prior unrelated conviction for [auto theft] [receiving stolen auto parts] commits a Class C felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had been convicted of [auto theft] [receiving stolen auto parts] before he committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of [auto theft] [receiving stolen auto parts], a Class C felony.

(Text continued on page 15-47)

Comments

Phase I of principal charge See Chapter 4, Instruction Nos. 4.35 and 4.39 (Auto Theft) or 4.37 (Receiving Stolen Auto Parts).

Instruction No. 15.42. Criminal Trespass — Phase II.

The State has filed an additional count alleging that the Defendant had been convicted of criminal trespass concerning the same property before he/she committed Count _____. A person who commits criminal trespass when he/she has a prior conviction for criminal trespass concerning the same property commits a Class D felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had been convicted of criminal trespass concerning the same property before he/she committed Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of criminal trespass, a Class D felony.

Comments

Phase I of principal charge — see Chapter 4, Instruction Nos. 4.19 (Criminal Trespass — Entering Real Property), 4.21 (Criminal Trespass — Refusing to Leave Real Property), 4.23 (Criminal Trespass — Vehicles), 4.25 (Criminal Trespass — Interfering with Possession of Property), 4.27 (Criminal Trespass — Entering a Dwelling), and 4.27a (Criminal Trespass — Train Travel Without Consent).

Instruction No. 15.43. Battery of Person — Second Offense — Elements Phase II.

I.C. 35-42-2-1(2)(D).

The State has filed an additional count alleging that the Defendant was previously convicted of a battery against [*name*], the same person on whom he/she committed the battery in Count _____. Battery is a Class D felony if it results in bodily injury to the other person and the person who commits the battery was previously convicted of a battery against the same person.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

1. The battery committed by the Defendant resulted in bodily injury to another person,; and
2. The Defendant had been previously convicted of battery of the same person, [*name*], before Defendant committed the battery charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of battery of the person, a Class D felony.

Comments

Phase I of principal charge *see* Chapter 3, Instruction Nos. 3.13.1 and 3.13.2.

Instruction No. 15.43a. Domestic Battery.

I.C. 35-42-2-1.3.

The State has filed an additional count alleging that the Defendant had been convicted of a [domestic battery], [an offense in (another state) (a military court) (*name jurisdiction*) substantially similar to domestic battery] before he/she committed the offense charged in Count _____. A person who commits domestic battery when he/she has a previous unrelated conviction [of domestic battery under I.C. (35-42-2-1.3) and (35-42-2-1(a) (2) before its repeal)] [in any other jurisdiction (including a military court) in which the elements of the crime for which the conviction was entered are substantially similar to the elements described in I.C. 35-42-2-1.3] commits a Class D felony.

[The Court instructs you that, as a matter of law, the (*name alleged other jurisdiction*) conviction of (*describe offense*) has elements which are substantially similar to the elements of the Indiana offense of domestic battery, under I.C. 35-42-2-1.3.]

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

1. The Defendant;
2. had previously been convicted of an unrelated

   [domestic battery in Indiana under (I.C. 35-42-2-1.3)(I.C. 35-42-2-1(a) (2))]

   or

   [offense of (*describe offense*) in (*name alleged other jurisdiction*)];
3. and the previous conviction occurred before the Defendant committed the domestic battery charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of domestic battery, a Class D felony.

Comments

Phase I of principal charge — *see* Chapter 3, Instruction No. 3.13b.

The Committee has concluded that the "substantial similarity" issue about the other jurisdiction's offense is one for the court to

determine, by judicially noticing the offense's definition and comparing it with the Indiana offense. *See Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana is a "controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury that marijuana is a "controlled substance"). In making the similarity determination, the court must look at the definition of the other jurisdiction's offense in effect at the time of the Indiana battery charged in the current prosecution. *See State v. Akins*, 824 N.E.2d 676 (Ind. 2005) (with Indiana OVWI "previous conviction of operating while intoxicated" definition as a conviction "in any other jurisdiction in which the elements of the crime for which the conviction was entered are substantially similar to the elements of the Indiana offense," "the correct comparison is between the Michigan statute under which the defendant was convicted and the Indiana statute at the time of the Indiana offense," not at the time the prior Michigan conviction was entered).

Instruction No. 15.44. Intimidation — Second Offense — Phase II.

I.C. 35-45-2-1(c).

The State has filed an additional count alleging that the Defendant had been convicted of intimidation concerning the same person before the Defendant committed the offense charged in Count _____. A person who commits intimidation when he/she has a prior conviction of intimidation concerning the same person commits a Class D felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant was convicted of intimidation of the same person, [*victim's name*], before the Defendant committed the intimidation of [*victim's name*] charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of intimidation, a Class D felony.

(Text continued on page 15-55)

Comments

Phase I of principal charge — see Chapter 6, Instruction No. 6.03.

Instruction No. 15.44a. Check Fraud, Class C Felony.

I.C. 35-43-5-12.

The State has filed an additional count alleging that the Defendant had been convicted of check fraud at the time he/she committed the offense charged in Count _____. A person who commits check fraud when the Defendant has a prior unrelated conviction for check fraud commits a Class C felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had been convicted of check fraud before the Defendant committed the offense charged in Count _____.

If the State failed to prove this element beyond a reasonable doubt, you must find the Defendant not guilty of check fraud, a Class C felony.

Comments

For Phase I instructions on the principal charge of check fraud, *see* Chapter 4, Instruction No. 4.60(a), 4.60(b), 4.60(c), 4.61.

Instruction No. 15.45. Dealing or Possession—Marijuana, Hashish, Salvia: Class D Felony—Elements—Phase II.

I.C. 35-48-4-10, I.C. 35-48-4-11.

The State has filed an additional count alleging that the Defendant had been convicted of an offense involving [marijuana] [hash oil] [hashish] [salvia] before the Defendant committed the offense charged in Count _____. A person who

[manufactures]

[finances the manufacture of]

[delivers]

[finances the delivery of]

[possesses]

[possesses with intent to manufacture]

[possesses with intent to finance the manufacture]

[possesses with intent to deliver]

[possesses with intent to finance the delivery of]

[marijuana] [hash oil] [hashish] [salvia]

[or]

[grows or cultivates marijuana]

[or]

[fails to destroy (marijuana plants) he/she knows are growing on his/her premises]

when the Defendant has a prior conviction of an offense involving [marijuana] [hash oil] [hashish] [salvia] commits a Class D felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had been convicted of an offense involving [marijuana] [hash oil] [hashish] [salvia] before he/she committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of [dealing in] [possession of] [marijuana] [hash oil] [hashish] [salvia], a Class D felony.

Comments

For Phase I instructions on the principal charge, *see* Chapter 8, Instruction No. 8.33 (dealing) or 8.35 (possession).

Instruction No. 15.45.5. Dealing in a Synthetic Drug or Synthetic Drug Lookalike Substance.

I.C. 35-48-4-10.5.

The State has filed an additional count alleging that the Defendant had been convicted of dealing in [a synthetic drug] [a synthetic drug lookalike substance] before the Defendant committed the offense charged in Count _____. A person who

[manufactures]

[finances the manufacture of]

[delivers]

[finances the delivery of]

[possesses with intent to manufacture]

[possesses with intent to finance the manufacture]

[possesses with intent to deliver]

[possesses with intent to finance the delivery of]

[a synthetic drug] [a synthetic drug lookalike substance]

when the Defendant has a prior conviction of dealing in [a synthetic drug] [a synthetic drug lookalike substance] commits a Class D felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had been convicted of dealing in [a synthetic drug] [a synthetic drug lookalike substance] before he/she committed the offense charged in Count _____

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of [dealing in] [possession of] [marijuana] [hash oil] [hashish] [salvia] [a synthetic drug], a Class D felony.

Comments

For Phase I instructions on the principal charge, *see* Chapter 8, Instruction Nos 8.33.1 (infraction) or 8.33.3 (misdemeanor).

(Text continued on page 15-59)

Instruction No. 15.46. Operating With Eight-hundredths Gram of Alcohol, Fifteen-hundredths Gram of Alcohol, Operating With Controlled Substance, or Operating While Intoxicated, Class D Felony—Previous Conviction of Operating While Intoxicated—Phase II.

I.C. 9-30-5-1; I.C. 9-30-5-2.

The State has filed an additional count alleging that the Defendant had been convicted of the crime of:

[operating a vehicle with at least eight-hundredths (0.08) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[operating a vehicle with at least fifteen-hundredths (0.15) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[operating a vehicle with a controlled substance listed in Schedule I or II, or its metabolite, in the body]

[operating a vehicle while intoxicated]

[the offense in the State of _____ having elements substantially similar to those in the Indiana offense of *(indicate offense listed above)*]

and that this conviction occurred within the five year period before he/she committed the offense charged in Count _____. A person who commits:

[operating a vehicle with at least eight-hundredths (0.08) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[operating a vehicle with at least fifteen-hundredths (0.15) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[operating a vehicle with a controlled substance listed in Schedule I or II, or its metabolite, in the body]

[operating a vehicle while intoxicated]

when he/she has a previous conviction within the preceding five years of:

[operating a vehicle with at least eight-hundredths (0.08) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[operating a vehicle with at least fifteen-hundredths (0.15) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[operating a vehicle with a controlled substance listed in Schedule I or II, or its metabolite, in the body]

[operating a vehicle while intoxicated]

[the offense in the State of _____ having elements substantially similar to those to those in the Indiana offense of *(indicate offense listed above)*]

commits a class D felony.

You may convict the Defendant on this additional count only if the State has proven

beyond a reasonable doubt:

The Defendant

1. had been convicted of:

[operating a vehicle with at least eight-hundredths (0.08) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[operating a vehicle with at least fifteen-hundredths (0.15) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[operating a vehicle with a controlled substance listed in Schedule I or II, or its metabolite, in the body]

[operating a vehicle while intoxicated]

[the offense in the State of _____ having elements substantially similar to those in the Indiana offense of *(indicate offense listed above)*]

before he/she committed the offense charged in Count _____, and

2. the previous conviction occurred within the five (5) years immediately before Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of:

[operating a vehicle with at least eight-hundredths (0.08) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[operating a vehicle with at least fifteen-hundredths (0.15) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[operating a vehicle with a controlled substance listed in Schedule I or II, or its metabolite, in the body]

[operating a vehicle while intoxicated],

a class D felony.

Comments

The phrase "previous conviction of operating while intoxicated" is defined by law. I.C. 9-13-2-130; Instruction No. 14.158.

Phase I of principal charge — *see* Chapter 7, Instruction Nos. 7.111, 7.112, 7.113, and 7.114.

In determining whether the other state's offense had elements "substantially similar" to the Indiana offense, the court is to look to the elements of the other state's offense as in effect at the time of the out-of-state conviction and to the elements of the Indiana statute as in effect at the time the offense being tried was committed. *State v. Akins*, 824 N.E.2d 676 (Ind. 2005). The Committee believes that the question whether the other state's offense is "substantially similar" to the Indiana offense is one of law, to be resolved by the trial court and not the jury. *See Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a

"controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance").

Instruction No. 15.47. Operating With Eight-hundredths Gram of Alcohol, Fifteen hundredths Gram of Alcohol, Operating With Controlled Substance, or Operating While Intoxicated, Class C or B Felony for Serious Bodily Injury or Death With Prior Conviction.

I.C. 9-30-5-4; I.C. 9-30-5-5.

The State has filed an additional count alleging that the Defendant had been convicted of the crime of:

[operating a vehicle with at least eight-hundredths (0.08) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[operating a vehicle with at least fifteen-hundredths (0.15) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[operating a vehicle with a controlled substance listed in Schedule I or II, or its metabolite, in the body]

[operating a vehicle while intoxicated]

[the offense in the State of _____ having elements substantially similar to those to those in the Indiana offense of *(indicate offense listed above)*]

and that this conviction occurred within the five year period before he/she committed the offense charged in Count _____. A person who commits:

[operating a vehicle with at least eight-hundredths (0.08) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[operating a vehicle with at least fifteen-hundredths (0.15) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[operating a vehicle with a controlled substance listed in Schedule I or II, or its metabolite, in the body]

[operating a vehicle while intoxicated]

causing [serious bodily injury] [death] when he/she has a previous conviction within the preceding five years of:

[operating a vehicle with at least eight-hundredths (0.08) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[operating a vehicle with at least fifteen-hundredths (0.15) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[operating a vehicle with a controlled substance listed in Schedule I or II, or its metabolite, in the body]

[operating a vehicle while intoxicated]

[the offense in the State of _____ having elements substantially similar to those to those in the Indiana offense of *(indicate offense listed above)*]

commits a class [C (serious bodily injury)] [B (death)] felony.

You may convict the Defendant on this additional count only if the State has proven beyond a reasonable doubt:

The Defendant

1. had been convicted of:

[operating a vehicle with at least eight-hundredths (0.08) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[operating a vehicle with at least fifteen-hundredths (0.15) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[operating a vehicle with a controlled substance listed in Schedule I or II, or its metabolite, in the body]

[operating a vehicle while intoxicated]

[the offense in the State of _____ having elements substantially similar to those in the Indiana offense of *(indicate offense listed above)*]

before he/she committed the offense charged in Count _____, and

2. the previous conviction occurred within the five (5) years immediately before Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of:

[operating a vehicle with at least eight-hundredths (0.08) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[operating a vehicle with at least fifteen-hundredths (0.15) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[operating a vehicle with a controlled substance listed in Schedule I or II, or its metabolite, in the body]

[operating a vehicle while intoxicated],

a class [C (serious bodily injury)] [B (death)] felony.

Comments

Phase I of principal charge — *see* Chapter 7, Instruction Nos. 7.111, 7.112, 7.113, and 7.114.

In determining whether the other state's offense had elements "substantially similar" to the Indiana offense, the court is to look to the elements of the other state's offense as in effect at the time of the out-of-state conviction and to the elements of the Indiana statute as in effect at the time the offense being tried was committed. *State v. Akins*, 824 N.E.2d 676 (Ind. 2005). The Committee believes that the question whether the other state's offense is "substantially similar" to the Indiana offense is one of law, to be resolved by the trial court and not the jury. *See Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled substance" not a question of fact for the jury; trial judge properly took

judicial notice of statutes and instructed the jury marijuana is a "controlled substance").

Instruction No. 15.47a. Operating With Eight-hundredths Gram of Alcohol, Fifteen hundredths Gram of Alcohol, Operating with Controlled Substance,l or Operating While Intoxicated, Class B Felony for Death While Suspended for Prior Conviction.

I.C. 9-30-5-4; I.C. 9-30-5-5.

The State has filed an additional count alleging that the Defendant had his/her [driver's license] [driving privilege] [driving permit] (suspended) (revoked) for a previous conviction of:

[operating a vehicle with at least eight-hundredths (0.08) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[operating a vehicle with at least fifteen-hundredths (0.15) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[operating a vehicle with a controlled substance listed in Schedule I or II, or its metabolite, in the body]

[operating a vehicle while intoxicated]

[the offense in the State of _____ having elements substantially similar to those in the Indiana offense of *(indicate offense listed above)*]

when he/she committed the offense charged in Count _____. A person who commits

[operating a vehicle with at least eight-hundredths (0.08) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath) causing death of another person]

[operating a vehicle with at least fifteen-hundredths (0.15) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath) causing death of another person]

[operating a vehicle with a controlled substance listed in Schedule I or II, or its metabolite, in the body, causing death of another person]

[operating a vehicle while intoxicated, causing death of another person]

when the person knows that the person's [driver's license] [driving privilege] [driving permit] was (suspended) (revoked) for a previous conviction of:

[operating a vehicle with at least eight-hundredths (0.08) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[operating a vehicle with at least fifteen-hundredths (0.15) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[operating a vehicle with a controlled substance listed in Schedule I or II, or its metabolite, in the body]

[operating a vehicle while intoxicated]

[the offense in the State of _____ having elements substantially similar to those in the Indiana offense of *(indicate offense listed above)*]

commits a Class B felony.

Before you may convict the Defendant on this additional count, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant knew that the Defendant's [driver's license] [driving privilege] [driving permit]
2. was [suspended] [revoked]
3. for a previous conviction of

[operating a vehicle with at least eight-hundredths (0.08) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[or]

[operating a vehicle with at least fifteen-hundredths (0.15) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath)]

[or]

[operating a vehicle with a controlled substance listed in Schedule I or II, or its metabolite, in the body]

[or]

[operating a vehicle while intoxicated]

[or]

[the offense in the State of _____ having elements substantially similar to those in the Indiana offense of *(indicate offense listed above)*]

4. when he/she committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of:

[operating a vehicle with at least eight-hundredths (0.08) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath) causing death of another person]

[operating a vehicle with at least fifteen-hundredths (0.15) gram of alcohol (in 100 milliliters of the blood) (in 210 liters of the breath) causing death of another person]

[operating a vehicle with a controlled substance listed in Schedule I or II, or its metabolite, in the body, causing death of another person]

[operating a vehicle while intoxicated, causing death of another person]

with knowledge of [driver's license] [driving privilege] [driving permit] (suspended) (revoked) for a previous conviction, a Class B felony.

Comments

Phase I of principal charge—*see* Chapter 7, Instruction Nos. 7.111, 7.112, 7.113, and 7.114.

In determining whether the other state's offense had elements "substantially

similar" to the Indiana offense, the court is to look to the elements of the other state's offense as in effect at the time of the out-of-state conviction and to the elements of the Indiana statute as in effect at the time the offense being tried was committed. *State v. Akins*, 824 N.E.2d 676 (Ind. 2005). The Committee believes that the question whether the other state's offense is "substantially similar" to the Indiana offense is one of law, to be resolved by the trial court and not the jury. *See Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance").

Instruction No. 15.48a. Dangerous Possession of a Firearm—Phase II.

I.C. 35-47-10-5.

The State has filed an additional count alleging that the Defendant had been convicted of the crime of dangerous possession of a firearm before the Defendant committed the offense charged in Count _____. A person who commits dangerous possession of a firearm when the Defendant has a prior conviction of dangerous possession of a firearm commits a Class C felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had been convicted of the crime of dangerous possession of a firearm before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of dangerous possession of a firearm, a Class C felony.

(Text continued on page 15-67)

Comments

Phase I of principal charge — see Chapter 7, Instruction Nos. 7.39C and 7.39D.

Instruction No. 15.48b. Dangerous Control of a Firearm — Phase II.

I.C. 35-47-10-6.

The State has filed an additional count alleging that the Defendant had been convicted of the crime of dangerous control of a firearm before the Defendant committed the offense charged in Count _____. A person who commits dangerous control of a firearm when the Defendant has a prior conviction of dangerous control of a firearm commits a Class B felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had been convicted of the crime of dangerous control of a firearm before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of dangerous control of a firearm, a Class B felony.

Comments

Phase I of principal charge — see Chapter 7, Instruction No. 7.39E (Dangerous Control of a Firearm).

Instruction No. 15.48c. Dangerous Control of a Child — Phase II.

I.C. 35-47-10-7.

The State has filed an additional count alleging that the Defendant had been convicted of the crime of dangerous control of a child before the Defendant committed the offense charged in Count _____. A person who commits dangerous control of a child when the Defendant has a prior conviction of dangerous control of a child commits a Class B felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had been convicted of the crime of dangerous control of a child before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of dangerous control of a child, a Class B felony.

Comments

Phase I of principal charge — see Chapter 7, Instruction No. 7.39f (Dangerous Control of Child).

Instruction No. 15.49. Carrying Handgun Without a License — Class C Felony — Phase II.

I.C. 35-47-2-1, I.C. 35-47-2-23.

The State has filed an additional count alleging that the Defendant had been

[convicted of carrying a handgun without a license before]

[convicted of using or attempting to use a false or altered handgun license before]

[convicted of a felony within fifteen (15) years of the time]

the Defendant committed the offense charged in Count _____. A person who commits carrying a handgun without a license when he/she has a prior conviction of

[carrying a handgun without a license]

[using or attempting to use a false or altered handgun license]

[a felony within fifteen (15) years of the time he/she committed carrying a handgun without a license]

commits a Class C felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had been

[convicted of carrying a handgun without a license before]

[convicted of using or attempting to use a false or altered handgun license before]

[convicted of a felony within fifteen (15) years of the time]

the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of carrying a handgun without a license, a Class C felony.

Comments

Phase I of principal charge — see Chapter 7, Instruction No. 7.35 (Carrying a Handgun Without a License).

Instruction No. 15.50. Using or Attempting to Use False or Altered Handgun License — Class D Felony — Elements—Phase II.

I.C. 35-47-2-22, I.C. 35-47-2-23.

The State has filed an additional count alleging that the Defendant had been

[convicted of carrying a handgun without a license before]

[convicted of using or attempting to use a false or altered handgun license before]

[convicted of a felony within fifteen (15) years of the time]

the Defendant committed the offense charged in Count _____A person who commits using or attempting to use a false or altered handgun license when he/she has a prior conviction of

[carrying a handgun without a license]

[using or attempting to use a false or altered handgun license]

[a felony within fifteen (15) years of the time he/she committed using or attempting to use a false or altered handgun license]

commits a Class D felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had been

[convicted of carrying a handgun without a license before]

[convicted of using or attempting to use a false or altered handgun license before]

[convicted of a felony within fifteen (15) years of the time]

the Defendant committed the offense charged in Count _____

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of using or attempting to use a false or altered handgun license, a Class D felony.

Comments

Phase I of principal charge see Chapter 7, Instruction No. 7.43 (False or Altered License).

Instruction No. 15.51. Manufacture of Paraphernalia — Phase II.

I.C. 35-48-4-8.1(b).

The State has filed an additional count alleging that the Defendant had a previous judgment or conviction for manufacture of paraphernalia before the Defendant committed the offense charged in Count _____. A person who commits manufacture of paraphernalia when the Defendant has a previous judgment or conviction for manufacture of paraphernalia commits a Class D felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had a previous judgment or conviction for manufacture of paraphernalia before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of manufacture of paraphernalia, a Class D felony.

Comments

Phase I of principal charge see Chapter 8, Instruction No. 8.23.

Instruction No. 15.53. Dealing in Paraphernalia — Phase II.

I.C. 35-48-4-8.2(b).

The State has filed an additional count alleging that the Defendant had a previous judgment or conviction for dealing in paraphernalia before the Defendant committed the offense charged in Count _____. A person who commits dealing in paraphernalia when the Defendant has a previous judgment or conviction for dealing in paraphernalia commits a Class D felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had a previous judgment or conviction for dealing in paraphernalia before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of dealing in paraphernalia, a Class D felony.

Comments

Phase I of principal charge see Chapter 8, Instruction No. 8.25.

Instruction No. 15.55. Reckless Dealing in Paraphernalia — Phase II.

I.C. 35-48-4-8.2(c).

The State has filed an additional count alleging that the Defendant had a previous judgment or conviction for either dealing in paraphernalia or reckless dealing in paraphernalia before the Defendant committed the offense charged in Count _____. A person who commits reckless dealing in paraphernalia when the Defendant has a previous judgment or conviction for either dealing in paraphernalia or reckless dealing in paraphernalia commits a Class D felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had a previous judgment or conviction for either dealing in paraphernalia or reckless dealing in paraphernalia before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of reckless dealing in paraphernalia, a Class D felony.

Comments

Phase I of principal charge see Chapter 8, Instruction No. 8.27.

Instruction No. 15.57. Possession of Paraphernalia — Phase II.

I.C. 35-48-4-8.3(b).

The State has filed an additional count alleging that the Defendant had a previous judgment or conviction for possession of paraphernalia before the Defendant committed the offense charged in Count _____. A person who commits possession of paraphernalia when the Defendant has a previous judgment or conviction for possession of paraphernalia commits a Class D felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had a previous judgment or conviction for possession of paraphernalia before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of possession of paraphernalia, a Class D felony.

Comments

Phase I of principal charge see Chapter 8, Instruction No. 8.29.

Instruction No. 15.59. Reckless Possession of Paraphernalia — Phase II.

I.C. 35-48-4-8.3(c).

The State has filed an additional count alleging that the Defendant had a previous judgment or conviction for possession of paraphernalia or reckless possession of paraphernalia before the Defendant committed the offense charged in Count _____. A person who commits reckless possession of paraphernalia when the Defendant has a previous judgment or conviction for possession of paraphernalia or reckless possession of paraphernalia commits a Class D felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had a previous judgment or conviction for possession of paraphernalia or reckless possession of paraphernalia before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of reckless possession of paraphernalia, a Class D felony.

Comments

Phase I of principal charge see Chapter 8, Instruction No. 8.31.

Instruction No. 15.61. Acquiring Possession of a Controlled Substance by Misrepresentation — Phase II.

I.C. 35-48-4-14(c).

The State has filed an additional count alleging that the Defendant had been convicted of the crime of acquiring possession of a controlled substance by

[misrepresentation]

[fraud]

[forgery]

[deception]

[subterfuge]

[alteration of a prescription order]

[concealment of a material fact]

[use of a false name or false address]

before the Defendant committed the offense charged in Count _____. A person who commits acquiring possession of a controlled substance by

[misrepresentation]

[fraud]

[forgery]

[deception]

[subterfuge]

[alteration of a prescription order]

[concealment of a material fact]

[use of a false name or false address]

when the Defendant has a prior conviction of acquiring possession of a controlled substance by

[misrepresentation]

[fraud]

[forgery]

[deception]

[subterfuge]

[alteration of a prescription order]

[concealment of a material fact]

[use of a false name or false address]

commits a Class C felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had been convicted of acquiring possession of a controlled substance by

[misrepresentation]

[fraud]

[forgery]

[deception]

[subterfuge]

[alteration of a prescription order]

[concealment of a material fact]

[use of a false name or false address]

before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of acquiring possession of a controlled substance by

[misrepresentation]

[fraud]

[forgery]

[deception]

[subterfuge]

[alteration of a prescription order]

[concealment of a material fact]

[use of a false name or false address]

, a Class C felony.

Comments

Phase I of principal charge see Chapter 8, Instruction No. 8.55.

Instruction No. 15.63. False Labeling of a Controlled Substance — Phase II.

I.C. 35-48-4-14(d).

The State has filed an additional count alleging that the Defendant had been convicted of the crime of false labeling of a controlled substance before the Defendant committed the offense charged in Count _____. A person who commits false labeling of a controlled substance when the Defendant has a prior conviction of false labeling of a controlled substance commits a Class C felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had been convicted of false labeling of a controlled substance before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of false labeling of a controlled substance, a Class C felony.

Comments

Phase I of principal charge see Chapter 8. Instruction No. 8.57.

Instruction No. 15.65. Unlawful Duplication of Prescription Pads — Phase II.

I.C. 35-48-4-14(e).

The State has filed an additional count alleging that the Defendant had been convicted of the crime of unlawful duplication of prescription pads or forms before the Defendant committed the offense charged in Count _____. A person who commits unlawful duplication of prescription pads or forms when the Defendant has a previous judgment or conviction for unlawful duplication of prescription pads or forms commits a Class C felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had a previous conviction for unlawful duplication of prescription pads or forms before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of unlawful duplication of prescription pads or forms, a Class C felony.

Comments

Phase I of principal charge see Chapter 8. Instruction No. 8.59.

Instruction No. 15.67. Prostitution — Patronizing a Prostitute — Phase II.

I.C. 35-45-4-2, I.C. 35-45-4-3.

The State has filed an additional count alleging that the Defendant had two prior convictions for [prostitution] [or] [patronizing a prostitute] before the Defendant committed the offense charged in Count _____. A person who commits [prostitution] [patronizing a prostitute] when the Defendant has two prior convictions for [prostitution] [or] [patronizing a prostitute] commits a Class D felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had two prior convictions for [prostitution] [or] [patronizing a prostitute] before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of [prostitution] [patronizing a prostitute], a Class D felony.

Comments

Phase I of principal charge see Chapter 6. Instruction No. 6.07 (Prostitution) or 6.09 (Patronizing a Prostitute).

Instruction No. 15.68(a). Failure to Restrain a Dog — B Misdemeanor I.C. 15-5-12-3. Phase II.

The State has filed an additional count alleging that the Defendant had been convicted of the crime of failure to restrain a dog before the Defendant committed the offense charged in Count _____. A person who commits failure to restrain a dog when the Defendant has a prior conviction of failure to restrain a dog commits a Class B misdemeanor.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had been convicted of the crime of failure to restrain a dog before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of failure to restrain a dog, a Class B misdemeanor.

Comments

Phase I of principal charge — see Chapter 6, Instruction No. 6.33.

Instruction No. 15.68(b). Failure to Restrain a Dog — Class A Misdemeanor — Phase II.

I.C. 15-5-12-3.

The State has filed an additional count alleging that the Defendant had been convicted of more than one (1) previous unrelated violation of failure to restrain a dog before the Defendant committed the offense charged in Count _____. A person who commits failure to restrain a dog when the Defendant has been convicted of more than one (1) previous unrelated violation of failure to restrain a dog commits a Class A misdemeanor.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had been convicted of more than one (1) previous unrelated violation of failure to restrain a dog before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of failure to restrain a dog, a Class A misdemeanor.

Comments

Phase I of principal charge — see Chapter 6, Instruction No. 6.33.

Note that if the jury does not find more than one previous unrelated violation, the conviction will be either a Class C misdemeanor or a Class B misdemeanor, depending on whether the State also alleged and proved only a single previous unrelated conviction of failure to restrain a dog.

Instruction No. 15.68c. Beating a Vertebrate Animal—Phase II.

I.C. 35-46-3-12.

The State has filed an additional count alleging that the Defendant had been convicted of the crime of [*describe the prior I.C. 35-46-3-12 conviction alleged*] before he/she committed the offense charged in Count _____. A person who commits beating a vertebrate animal when he/she has a prior conviction of [beating a vertebrate] [torturing or mutilating a vertebrate] animal commits a Class D felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had been convicted of [*describe the prior I.C. 35-46-3-12 conviction alleged*] before he/she committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of beating a vertebrate animal, a Class D felony.

Comments

For the Instruction on the charged Class A misdemeanor, see Instruction No. 7.510.

Instruction No. 15.68d. Neglect or Abandonment of an Animal—Phase II. Attendance at Fighting Contest—Phase II.

I.C. 35-46-3-7.

I.C. 35-46-3-10.

The State has filed an additional count alleging that the Defendant had been convicted of the crime of [*describe alleged offense under I.C. 35-46-3*] before he/she committed the offense charged in Count _____. A person who commits [neglect or abandonment of an animal] [attending an animal fighting contest] when he/she has a prior conviction of [*insert alleged prior conviction of the particular offense in I.C. 35-46-3*] commits a Class D felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had been convicted of the crime of [*insert alleged prior conviction of the particular offense in I.C. 35-46-3*] before he/she committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of [abandonment or neglect of an animal] [attending an animal fighting contest], a Class D felony.

Comments

For the Instruction on the charged Class A misdemeanor, see Instruction No. 7.501.

Instruction No. 15.70. Stalking — Class B Felony — Phase II.

I.C. 35-45-10-5.

The State has filed an additional count alleging that the Defendant had been convicted of stalking before the Defendant committed the offense charged in Count _____. A person who commits stalking when the Defendant has a prior conviction of stalking commits a Class B felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had been convicted of stalking before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of stalking, a Class B felony.

Comments

Phase I of principal charge *see* Chapter 6, Instruction No. 6.35.

(Text continued on page 15-103)

Instruction No. 15.71. Welfare Fraud — Phase II.

I.C. 35-43-5-7.

The State has filed an additional count alleging that the Defendant had been convicted of welfare fraud before the Defendant committed the offense charged in Count _____. A person who commits welfare fraud when the Defendant has a prior conviction of welfare fraud commits a Class D felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had been convicted of welfare fraud before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of welfare fraud, a Class D felony.

Comments

Phase I of principal charge see Chapter 4, Instruction Nos. 4.57(a), (b), (c), (d), and (e).

Instruction No. 15.73. Home Improvement Fraud — Phase II — Class B Misdemeanor Raised to Class A Misdemeanor.

I.C. 35-43-6-13(a)(2).

The State has filed an additional count alleging that the Defendant had been convicted of a home improvement fraud offense before he/she committed the offense charged in Count _____. A person who commits home improvement fraud when he/she has a prior conviction [of home improvement fraud in Indiana under I.C. 35-43-6] or [in another jurisdiction for an offense that is substantially similar to an Indiana home improvement fraud offense described in I.C. 35-43-6] commits a Class A misdemeanor.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had been convicted:

[of a home improvement fraud offense under I.C. 35-43-6]

[or]

[in (*name other jurisdiction*) for (*name the offense*), an offense which the court instructs you was substantially similar to an Indiana home improvement fraud offense described in I.C. 35-43-6]

before he/she committed the offense charged in Count_____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of home improvement fraud, a Class A misdemeanor.

Comments

Phase I of principal charge *see* Chapter 4, Instruction Nos. 4.69(a) through (g) (3).

The Committee has concluded that the "substantial similarity" issue about the other jurisdiction's offense is one for the court to determine, by judicially noticing the offense's definition and comparing it with the Indiana offense. *See Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana is a "controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury that marijuana is a "controlled substance"). In making the similarity determination, the court must look at the definition of the other jurisdiction's offense in effect at the time of the Indiana home improvement offense charged in the current prosecution. *See*

State v. Akins, 824 N.E.2d 676 (Ind. 2005) (with Indiana OVWI "previous conviction of operating while intoxicated" definition as a conviction "in any other jurisdiction in which the elements of the crime for which the conviction was entered are substantially similar to the elements of the Indiana offense," "the correct comparison is between the Michigan statute under which the defendant was convicted and the Indiana statute at the time of the Indiana offense," not at the time the prior Michigan conviction was entered).

(Text continued on page 15-107)

Instruction No. 15.75. Home Improvement Fraud C Victim Over Sixty (60)—Phase II.

I.C. 35-43-6-13(b)(2).

The State has filed an additional count alleging that the Defendant had been convicted of a home improvement fraud offense before the Defendant committed the offense charged in Count _____. A person who commits home improvement fraud against a consumer at least sixty (60) years of age with a home improvement contract price of one thousand dollars ($1,000) or less when the Defendant has a prior conviction of home improvement fraud commits a Class D felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had been convicted of a home improvement fraud offense before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of home improvement fraud, a Class D felony.

Comments

Phase I of principal charge *see* Chapter 4, Instruction Nos. 4.69(a), (b), (c), (d), (e), (f), (g) and (h). Note that the D felony offense here applies only to second or subsequent violations of I.C. 35-43-6-12(a)(1) through I.C. 35-43-6-12(a)(4).

The terms "consumer" and "home improvement contract price" are defined by law. *See* I.C. 35-43-6-2 and I.C. 35-43-6-5; Instruction Nos. 14.27 and 14.111.

Instruction No. 15.76. Public Indecency.

I.C. 35-45-4-5.

The State has filed an additional count alleging that the Defendant had been convicted of (public indecency in Indiana) (of an offense in another jurisdiction, including a military court, substantially similar to the Indiana offense of public indecency) before the Defendant committed the offense charged in Count _____. A person who commits public indecency when the person has a (prior unrelated conviction of public indecency in Indiana) (a prior unrelated conviction of a substantially similar offense in another jurisdiction, including a military court) commits a Class D felony.

You may convict the Defendant on this additional count only if the State has proven beyond a reasonable doubt:

The Defendant had a [prior unrelated conviction of public indecency in Indiana] [a prior conviction of an offense in another jurisdiction, including a military court, substantially similar to the Indiana offense of public indecency] before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of public indecency, a Class D felony.

Comments

Phase I of principal charge— *see* Chapter 6, Instruction No. 6.12.5.

(Text continued on page 15-109)

Instruction No. 15.77. Possession of Regulated Explosive.

I.C. 35-47.5-5-3.

The State has filed an additional count alleging that the Defendant had been convicted of [possession] [manufacture] [transportation] [distribution] [possession with intent to distribute] [offering to distribute] a regulated explosive by a felon before the Defendant committed the offense charged in Count _____. A person who commits [possession] [manufacture] [transportation] [distribution] [possession with intent to distribute] [offering to distribute] a regulated explosive by a felon when the Defendant has a prior conviction of [possession] [manufacture] [transportation] [distribution] [possession with intent to distribute] [offering to distribute] a regulated explosive by a felon commits a Class B felony.

You may convict the Defendant on this additional count only if the State has proven beyond a reasonable doubt:

The Defendant had been convicted of [possession] [manufacture] [transportation] [distribution] [possession with intent to distribute] [offering to distribute] a regulated explosive by a felon before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of [possession] [manufacture] [transportation] [distribution] [possession with intent to distribute] [offering to distribute] a regulated explosive by a felon, a Class B felony.

Comments

Phase 1 — see Chapter 7, Instruction 7.73.

Instruction No. 15.79. Use of Overpressure Device.

I.C. 35-47.5-5-9.

The State has filed an additional count alleging that the Defendant had been convicted of use of an overpressure device before the Defendant committed the offense charged in Count _____. A person who commits use of an overpressure device when the Defendant has a prior conviction of use of an overpressure device commits a Class D felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had been convicted of use of an overpressure device before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of use of an overpressure device, a Class D felony.

Comments

Phase 1 — see Instruction No. 7.85.

Instruction No. 15.81. Exposure of a Minor or Endangered Adult to Drugs or Controlled Substances.

I.C. 35-48-4-13.3.

In Phase I of the trial, the Defendant was convicted of a Class A misdemeanor for exposure of a minor or endangered adult to drugs or controlled substances.

The State has filed an additional count alleging that the Defendant had been convicted of exposure of a minor or endangered adult to drugs or controlled substances before the Defendant committed the offense charged in Count _____. A person who commits exposure of a minor or endangered adult to drugs or controlled substances when the Defendant has a prior conviction of exposure of a minor or endangered adult to drugs or controlled substances commits a Class D felony.

You may convict the Defendant on this additional count only if the State has proved beyond a reasonable doubt that:

The Defendant had been convicted and sentenced for exposure of a minor or endangered adult to drugs or controlled substances before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of exposure of a minor or endangered adult to drugs or controlled substances.

Comments

Phase 1 — see Instruction No. 8.35a.

Instruction No. 15.82. Insurance Fraud.

I.C. 35-43-5-4.5.

The State has filed an additional count alleging that the Defendant had been convicted of insurance fraud before the Defendant committed the offense charged in Count _____. A person who commits insurance fraud when the person has a prior conviction of insurance fraud commits a Class C felony.

You may convict the Defendant on this additional count only if the State has proven beyond a reasonable doubt:

The Defendant had been convicted of insurance fraud before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of insurance fraud, a Class C felony.

Comments

Phase I of principal charge — see Chapter 4, Instruction Nos. 4.56.1, 4.56.2, 4.56.3, 4.56.4, 4.56.5, and 4.56.6.

Instruction No. 15.83. Voyeurism.

I.C. 35-45-4-5.

The State has filed an additional count alleging that the Defendant had been convicted of (voyeurism in Indiana) (of an offense in another jurisdiction, including a military court, substantially similar to the Indiana offense of voyeurism) before the Defendant committed the offense charged in Count _____. A person who commits voyeurism when the person has a (prior unrelated conviction of voyeurism in Indiana) (a prior unrelated conviction of a substantially similar offense in another jurisdiction, including a military court) commits a Class D felony.

You may convict the Defendant on this additional count only if the State has proven beyond a reasonable doubt:

The Defendant had a [prior unrelated conviction of voyeurism in Indiana] [a prior conviction of an offense in another jurisdiction, including a military court, substantially similar to the the Indiana offense of voyeurism] before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of voyeurism, a Class D felony.

Comments

Phase I of principal charge — *see* Chapter 6, Instruction No. 6.12.

Instruction No. 15.85. Failure of Offender to Register. Registration Misstatement or Omission. Failure to Register in Person. Failure to Reside at Registered Location.

I.C. 11-8-8-17.

The State has filed an additional count alleging that the Defendant had been convicted of [failure of an offender to register] [registration misstatement or omission] [failure to register in person] [failure to reside at registered location] before the Defendant committed the offense charged in Count _____. A person who commits [failure of an offender to register] [registration misstatement or omission] [failure to register in person] [failure to reside at registered location] when the person has a prior unrelated conviction of [failure of an offender to register] [registration misstatement or omission] [failure to register in person] [failure to reside at registered location] commits a Class C felony.

You may convict the Defendant on this additional count only if the State has proven beyond a reasonable doubt:

The Defendant had a prior unrelated conviction of [failure of an offender to register] [registration misstatement or omission] [failure to register in person] [failure to reside at registered location] before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of [failure of an offender to register] [registration misstatement or omission] [failure to register in person] [failure to reside at registered location], a Class C felony.

Comments

Phase I of principal charge — see Chapter 5, Instruction No. 5.47.1, 5.47.2, 5.47.3, 5.47.4, 5.47.5, 5.47.6, or 5.47.7.

Instruction No. 15.87. Possession of a Knife at School.

I.C. 35-47-5-2.5.

The State has filed an additional count alleging that the Defendant had been convicted of possession of a knife at school before the Defendant committed the offense charged in Count _____. A person who commits possession of a knife at school when the person has a prior conviction of possession of a knife at school commits a Class A misdemeanor.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had been convicted of possession of a knife at school before the Defendant committed the offense charged in Count _____.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of possession of a knife at school, a Class A misdemeanor as charged in Count _____.

Comments

Phase I of principal charge *see* Instruction 7.89.

Instruction No. 15.89. Unlawful Employment Near Children.

I.C. 35-42-4-10.

The State has filed an additional count alleging that at the time the Defendant committed the offense of unlawful employment near children the Defendant had a prior unrelated conviction based on Defendant's failure to comply with a requirement imposed on an offender under I.C. 35-42-4. A person who commits unlawful employment near children when the person has a prior unrelated conviction based on failure to comply with a requirement imposed on an offender under I.C. 35-42-4 commits unlawful employment near children, a Class C felony.

You may convict the Defendant on this additional count only if the State has proven beyond a reasonable doubt:

1. The Defendant
2. had a prior unrelated conviction of (insert name of alleged prior)
3. when the Defendant committed the offense charged in Count _____, and
4. the Court instructs you that (insert name of alleged prior) is an offense which is based on failure to comply with a requirement imposed on an offender under I.C. 35-42-4.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of unlawful employment near children by a sexual predator, a Class C felony as charged in Count _____.

Comments

Phase I of principal charge *see* — Chapter 3, Instruction No. 3.44.

The Committee believes it is a question of law whether "a prior unrelated conviction" is one "based on the person's failure to comply with any requirement imposed on an offender under this chapter," I.C. 35-42-4. See *Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance").

Instruction No. 15.91. Lifetime Parole Violation — Contact with Child or Victim.

I.C. 35-44-3-13.

The State has filed an additional count alleging that the Defendant had been convicted of the offense of lifetime parole violation — contact with child or victim before he/she committed the offense charged in Count _____. A person who commits lifetime parole violation — contact with child or victim when the person has a prior unrelated conviction of lifetime parole violation — contact with child or victim commits a Class C felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had a prior unrelated conviction of lifetime parole violation — contact with child or victim before the Defendant committed the offense charged in Count _____.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of lifetime parole violation — contact with child or victim, a Class C felony as charged in Count _____.

Comments

Phase I of principal charge *see* Chapter 5, Instruction No. 5.49.

Instruction No. 15.93. Failure of an Offender to Possess Identification.

I.C. 11-8-8-15.

The State has filed an additional count alleging that the Defendant [had a prior unrelated conviction of (failure of an offender to possess identification) (an offender registration offense under IC 11-8-8) before the Defendant committed the offense charged in Count _____] or [had the legal status of a sexually violent predator when the Defendant committed the offense charged in Count _____].

A person who commits failure of an offender to possess identification when the person [has a prior unrelated conviction of (failure of an offender to possess identification) (an offender registration offense under IC 11-8-8)] [has the legal status of a sexually violent predator] commits failure of an offender to possess identification, a Class D felony.

You may convict the Defendant on this additional count only if the State has proven beyond a reasonable doubt:

The Defendant: [had a prior unrelated conviction of (failure of an offender to possess identification) (an offender registration offense under IC 11-8-8) before the Defendant committed the offense charged in Count _____] or [had the legal status of a sexually violent predator when the Defendant committed the offense charged in Count _____].

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of failure of an offender to possess identification, a Class D felony.

Comments

Phase I of principal charge *see* — Chapter 5, Instruction No. 5.51.

Instruction No. 15.94. Failure to Act as Required After Accident Involving Injury.

I.C. 9-26-1-8.

The State has filed an additional count alleging that the Defendant had been convicted of

- [reckless homicide resulting from the operation of a motor vehicle]
  [or]
- [voluntary manslaughter resulting from the operation of a motor vehicle]
  [or]
- [involuntary manslaughter resulting from the operation of a motor vehicle]
  [or]
- [failure of the driver of a motor vehicle involved in an accident involving (death) (injury) to any person to stop at the scene of the accident and give the required information and assistance]
  [or]
- [operation of a vehicle while intoxicated resulting in death]
  [or]
- [operation of a vehicle with at least ten-hundredths percent (0.10%) alcohol in the blood resulting in death]
  [or]
- [operation of a vehicle with at least ten-hundredths (0.10) gram of alcohol per (one hundred (100) milliliters of the blood) (two hundred ten (210) liters of the breath) resulting in death]
  [or]
- [operation of a vehicle with at least eight-hundredths (0.08) gram of alcohol per (one hundred (100) milliliters of the blood) (two hundred ten (210) liters of the breath) resulting in death]

within the five (5) years preceding the commission of the offense charged in Count A person who commits failure to act as required after an accident involving injury when the person has a conviction of _____

- [reckless homicide resulting from the operation of a motor vehicle]
  [or]
- [voluntary manslaughter resulting from the operation of a motor vehicle]
  [or]
- [involuntary manslaughter resulting from the operation of a motor vehicle]
  [or]
- [failure of the driver of a motor vehicle involved in an accident involving (death) (injury) to any person to stop at the scene of the accident and give the required information and assistance]

[or]

- [operation of a vehicle while intoxicated resulting in death]
  [or]
- [operation of a vehicle with at least ten-hundredths percent (0.10%) alcohol in the blood resulting in death] [operation of a vehicle with at least ten-hundredths (0.10) gram of alcohol per (one hundred (100) milliliters of the blood) (two hundred ten (210) liters of the breath) resulting in death]
  [or]
- [operation of a vehicle with at least eight-hundredths (0.08) gram of alcohol per (one hundred (100) milliliters of the blood) (two hundred ten (210) liters of the breath) resulting in death]

within the five (5) years preceding the commission of failure to act as required after an accident involving bodily injury commits failure to act as required after an accident involving bodily injury, a Class D felony.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

1. The Defendant
2. had been convicted of
   [reckless homicide resulting from the operation of a motor vehicle]
   [or]
   [voluntary manslaughter resulting from the operation of a motor vehicle]
   [or]
   [involuntary manslaughter resulting from the operation of a motor vehicle]
   [or]
   [failure of the driver of a motor vehicle involved in an accident involving (death) (injury) to any person to stop at the scene of the accident and give the required information and assistance]
   [or]
   [operation of a vehicle while intoxicated resulting in death]
   [or]
   [operation of a vehicle with at least ten-hundredths percent (0.10%) alcohol in the blood resulting in death] [operation of a vehicle with at least ten-hundredths (0.10) gram of alcohol per (one hundred (100) milliliters of the blood) (two hundred ten (210) liters of the breath) resulting in death]
   [or]
   [operation of a vehicle with at least eight-hundredths (0.08) gram of alcohol per (one hundred (100) milliliters of the blood) (two hundred ten (210) liters of the breath) resulting in death]
3. and the conviction in 2. above was within the five (5) years preceding (insert date of conviction on Count _____), the date on which the Defendant committed the crime of failure to act as required after an accident involving bodily injury in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of failure to act as required after an accident involving bodily injury, a Class D felony.

Comments

Phase I of principal charge — *see* Chapter 7, Instruction No. 7.101.

Instruction No. 15.95. Child Solicitation — Victim Under Fourteen.

I.C. 35-42-4-6.

The State has filed an additional count alleging that at the time the Defendant committed the offense of child solicitation by use of a computer network the Defendant had a previous unrelated conviction of child solicitation by use of a computer network. A person who commits child solicitation by use of a computer network when the person has a previous unrelated conviction of child solicitation by use of a computer network commits child solicitation, a Class B felony.

You may convict the Defendant on this additional count only if the State has proven beyond a reasonable doubt:

The Defendant had a previous unrelated conviction of child solicitation by use of a computer network before the defendant committed the offense charged in Count _____.

If the State filed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of child solicitation, a Class B felony.

Comments

Phase I of principal charge — *see* Chapter 3, Instruction No. 3.42.3.

Instruction No. 15.97. Child Solicitation—Victim Fourteen to Fifteen.

I.C. 35-42-4-6.

The State has filed an additional count alleging that at the time the Defendant committed the offense of solicitation of a child aged fourteen to fifteen by use of a computer network the Defendant had a previous unrelated conviction of solicitation of a child aged fourteen to fifteen by use of a computer network. A person who commits solicitation of a child aged fourteen to fifteen by use of a computer network when the person has a previous unrelated conviction of solicitation of a child aged fourteen to fifteen by use of a computer network commits child solicitation, a Class B felony.

You may convict the Defendant on this additional count only if the State has proven beyond a reasonable doubt:

The Defendant had a previous unrelated conviction of solicitation of a child aged fourteen to fifteen by use of a computer network before the defendant committed the offense charged in Count _____.

If the State filed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of child solicitation, a Class B felony.

Comments

Phase I of principal charge — *see* Chapter 3, Instruction No. 3.42.4.

Instruction No. 15.99. Sex Offender Internet Offense—Second Offense.

I.C. 35-42-4-12.

The State has filed an additional count alleging that at the time the Defendant committed the sex offender Internet offense the Defendant had a previous unrelated conviction of the sex offender Internet offense. A person who commits the sex offender Internet offense when the person has a previous unrelated conviction of the sex offender Internet offense commits the sex offender Internet offense, a Class D felony.

You may convict the Defendant on this additional count only if the State has proven beoynd a reasonable doubt:

The Defendant had a previous unrelated conviction of the sex offender Internet offense before the defendant committed the offense charged in Count _____.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of the sex offender Internet offense, a Class D felony.

Comments

Phase I of principal charge *see* Chapter 3, Instruction No. 3.61.

Instruction No. 15.101. Prior Conviction Resulting in Serious Bodily Injury or Death: [Operating a Vehicle With Eight-hundredths (0.08) Gram of Alcohol]; [Operating a Vehicle With Fifteen-hundredths (0.15) Gram of Alcohol]; [Operating a Vehicle With Controlled Substance or Metabolite]; [Operating a Vehicle While Intoxicated]. I.C. 9-30-5-3(b).

The State has filed an additional count alleging that at the time the Defendant committed [operating a vehicle with eight-hundredths (0.08) gram of alcohol] [operating a vehicle with Fifteen-hundredths (0.15) gram of alcohol] [operating a vehicle with controlled substance or metabolite] [operating a vehicle while intoxicated] the Defendant had a previous unrelated conviction of operating while intoxicated [causing serious bodily injury] [causing death]. A person who commits [operating a vehicle with eight-hundredths (0.08) gram of alcohol] [operating a vehicle with Fifteen-hundredths (0.15) gram of alcohol] [operating a vehicle with controlled substance or metabolite] [operating a vehicle while intoxicated] when the person has a previous unrelated conviction of operating while intoxicated [causing serious bodily injury] [causing death] commits [operating a vehicle with eight-hundredths (0.08) gram of alcohol] [operating a vehicle with Fifteen-hundredths (0.15) gram of alcohol] [operating a vehicle with controlled substance or metabolite] [operating a vehicle while intoxicated], a Class C felony.

You may convict the Defendant on this additional count only if the State has proven beyond a reasonable doubt:

The Defendant had a previous unrelated conviction of

- [operating a vehicle with eight-hundredths (0.08) gram of alcohol]
- [operating a vehicle with Fifteen-hundredths (0.15) gram of alcohol]
- [operating a vehicle with controlled substance or metabolite]
- [operating a vehicle while intoxicated] _____

[resulting in death] [resulting in serious bodily injury] before the Defendant commited the offense charged in Count _____.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of [operating a vehicle with eight-hundredths (0.08) gram of alcohol] [operating a vehicle with Fifteen-hundredths (0.15) gram of alcohol] [operating a vehicle with controlled substance or metabolite] [operating a vehicle while intoxicated], a Class C felony.

Comments

Phase I of principal charge *see* Chapter 7, Instruction Nos. 7.111, 7.112, 7.113, or 7.114.

Instruction No. 15.103. Public Voyeurism.

I.C. 35-45-4-5.

The State has filed an additional count alleging that the Defendant had been convicted of (public voyeurism in Indiana) (of an offense in another jurisdiction, including a military court, substantially similar to the Indiana offense of public voyeurism) before the Defendant committed the offense charged in Count _____. A person who commits public voyeurism when the person has a (prior unrelated conviction of public voyeurism in Indiana) (a prior unrelated conviction of a offense in another jurisdiction, including a military court, substantially similar to the Indiana offense of public voyeurism) commits a Class D felony.

You may convict the Defendant on this additional count only if the State has proven beyond a reasonable doubt:

The Defendant had a [prior unrelated conviction of public voyeurism in Indiana] [a prior conviction of an offense in another jurisdiction, including a military court, substantially similar to the Indiana offense of pubic voyeurism] before the Defendant committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of public voyeurism, a Class D felony.

Comments

Phase I of principal charge—*see* Chapter 6, Instruction No. 6.12.1.

Instruction No. 15.156.03. Possession of Animal Fighting Paraphernalia.

I.C. 35-45-3-8.5.

The State has filed an additional count alleging that the Defendant had been convicted of the crime of possession of animal fighting paraphernalia before he/she committed the offense charged in Count _____. A person who commits possession of animal fighting paraphernalia when he/she has a prior conviction of possession of animal fighting paraphernalia commits a Class A misdemeanor.

You may convict the Defendant on this additional count, only if the State has proven beyond a reasonable doubt:

The Defendant had been convicted of the crime of possession of animal fighting paraphernalia before he/she committed the offense charged in Count _____.

If the State failed to prove this beyond a reasonable doubt, you must find the Defendant not guilty of the crime of possession of animal fighting paraphernalia, a Class A misdemeanor.

Comments

For the Instruction on the charged Class B misdemeanor, see Instruction No. 7.532.

CHAPTER 16

VERDICTS

SYNOPSIS

(Text continued on page 16-3)

Verdicts — Comments.

The Committee recommends multiple verdict forms be provided the jury in all cases where the prosecution is relying on more than one theory to gain a conviction or to enhance the penalty. In the same class of felony the sentence is suspendable, or not, depending on what theory is selected by the jury.

We have included also a verdict form to make specific findings in a case where the prosecution has charged more than two prior, unrelated felonies in an habitual offender count. Special verdicts are outlawed, but this form has been approved and encouraged by the Indiana Supreme Court as not constituting a special verdict. Often it would obviate the necessity of retrial in the event one of the prior convictions turns out to be invalid.

Instruction No. 16.01. Guilty.

We, the jury, find the Defendant guilty of _____, a Class _____ [misdemeanor] [felony].

_____ _____

Date Foreperson

Instruction No. 16.03. Guilty — Mentally Ill.

We, the jury, find the Defendant, _____, guilty, but mentally ill at the time of the offense.

_____ _____

Date Foreperson

Instruction No. 16.05. Not Guilty.

We, the jury, find the Defendant, not guilty.

_____ _____

Date ..... Foreperson

Instruction No. 16.07. Not Guilty — Insanity.

We, the jury, find the Defendant, not responsible by reason of insanity at the time of the offense.

_____ _____

Date Foreperson

Instruction No. 16.09. Habitual Offender — General Verdict.

We, the jury, find the Defendant, to be an habitual offender.

_____ _____

Date Foreperson

Instruction No. 16.11. Habitual Offender — Specific Findings and Verdict When Three or More Priors Are Alleged.

Specific Findings:

We, the jury, find that the Defendant has the following prior convictions:

1. [*Here set out first conviction alleged in habitual information*].

[*Jurors, indicate "yes" Defendant has conviction 1. or "no" Defendant does not have conviction 1.*]

2. [*Here set out second conviction alleged in habitual information*].

[Jurors, indicate "yes" Defendant has conviction 2. or "no" Defendant does not have conviction 2.]

3. [*Here set out conviction reached in Phase 1*]

[Jurors, indicate "yes" Defendant has conviction 3. or "no" Defendant does not have conviction 3.]

Note to Judge — provide on verdict form for a jury finding on all priors alleged by the State.

Verdict:

We, the jury, find that the Defendant

[ ] is

[ ] is not

an habitual offender.

_____ _____

Date Foreperson

Comments

Seay v. State, 698 N.E.2d 732, 735-36, n. 7 (Ind. 1998) expressly "overrule[d] or disapprove[d] of [a number of cited] cases to the extent they permitted special verdict forms in habitual offender proceedings which did not allow the jury to find that the defendant was not a habitual offender even though there was a finding that the State had proven beyond a reasonable doubt that defendant had accumulated two prior unrelated felony convictions." The Criminal Pattern 16.11 findings and verdict form here is intended to comply with this express determination in *Seay*.

When this form is used, be sure to provide for a jury finding on each alleged prior conviction for which sufficient evidence is admitted.

Note that the verdict form as modified only confirms whether the jury found or did not find that the defendant had specific prior convictions. It does not require the jury to indicate its findings bearing on the chronological sequence of felony commissions and convictions necessary for habitual offender status — e.g., that defendant committed and was convicted of felony 1 prior to committing felony 2.

Instruction No. 16.12. Repeat Sex Offender — Separate Finding and Verdict When More Than One Prior Is Alleged.

Specific Findings:

1. We, the jury, find that the Defendant has the following prior conviction:

   [*Here set out first conviction alleged in repeat sexual offender information*].

   [*Jurors, indicate ("yes" Defendant has conviction 1). or ("no" Defendant does not have conviction 1).*]

   We the jury, further find [yes, that this conviction occurred before the offense of (*name offense in Count* _____) in Count _____ was committed] [no, that this conviction did not occur before the offense of (*name offense in Count* _____) in Count _____ was committed].

2. We, the jury, find that the Defendant has the following prior conviction:

   [*Here set out second prior conviction alleged in repeat sexual offender information*].

   [*Jurors, indicate (yes Defendant has conviction 1). or (no Defendant does not have conviction 1).*]

   We the jury, further find [yes, that this conviction occurred before the offense of (*name offense in Count* _____) in Count _____ was committed] [no, that this conviction did not occur before the offense of (*name offense in Count* _____) in Count _____ was committed].

   Note to Judge — continue here to provide for a jury finding on all priors alleged by the State.

Verdict:

We, the jury, find that the Defendant

[yes, is]

[no, is not]

a repeat sexual offender.

Date _____ Foreperson _____

Comments

Seay v. State, 698 N.E.2d 732, 735–36, n. 7 (Ind. 1998) expressly "overrule[d] or disapprove[d] of [a number of cited] cases to the extent they permitted special verdict forms in habitual offender proceedings which did not allow the jury to find that the defendant was not a habitual offender even though there was a finding that the State had proven beyond a reasonable doubt that defendant had accumulated two prior unrelated felony convictions." The Criminal Pattern repeat sex offender findings and verdict form here is intended to comply with this express determination in *Seay*.

When this form is used, be sure to provide for a jury finding on each alleged prior conviction for which sufficient evidence is admitted.

Note that the verdict form as modified only confirms whether the jury found or did not find that the defendant had specific prior convictions. It does not require the jury to indicate its findings bearing on the chronological sequence of felony commissions and convictions necessary for repeat sexual offender status — e.g., that defendant committed and was convicted of the alleged prior before committing the offense in Phase I.

Instruction No. 16.13. Not an Habitual Offender.

We, the jury, find that the Defendant is not an habitual offender.

_____ _____

Date Foreperson

(Text continued on page 16-13)

Instruction No. No.16.15. Verdict Form — Aggravating Circumstance Found.

[For each alleged aggravating circumstance, the Committee recommends that you provide the following form:]

VERDICT FORM IA

VERDICT FORM FOR CHARGED
CIRCUMSTANCE NUMBER _____

We, the Jury, find that the State of Indiana has proven beyond a reasonable doubt the charged aggravating circumstance that [*state aggravating circumstance alleged here*].

Date: _____

_____
Signature of ForePerson

Instruction No. 16.16. Verdict Form — Aggravating Circumstance Not Found.

[For each alleged aggravating circumstance, the Committee recommends that you provide the following form:]

VERDICT FORM IB

VERDICT FORM FOR CHARGED
CIRCUMSTANCE NUMBER _____

We, the Jury, find that the State of Indiana has not proven beyond a reasonable doubt the charged aggravating circumstance that [*state aggravating circumstance alleged here*].

Date: _____

_____
Signature of Foreperson

No. 16.17. Verdict Form—Aggravating Circumstances and Mitigating Circumstances Balance.

VERDICT FORM II

We, the Jury, find that the charged aggravating circumstance(s) that exist do not outweigh any mitigating circumstances herein.

Date: _____

_____
Signature of Foreperson

We, the Jury, find that the charged aggravating circumstance(s) that exist outweigh any mitigating circumstances herein.

Date: _____

_____
Signature of Foreperson

Comments

It has been held that the determination that the aggravating factor or factors outweigh the mitigating factors does not have to be made beyond a reasonable doubt. *Covington v. State*, 842 N.E.2d 345, 351 (Ind. 2006).

(Text continued on page 16-17)

Instruction No. 16.18. Verdict Form — Recommending a Sentence.

VERDICT FORM FOR RECOMMENDING A TERM OF YEARS

We, the Jury, recommend a sentence of a term of years for Defendant _____

Date: _____

_____
Signature of Foreperson

-OR-

VERDICT FORM RECOMMENDING LIFE IMPRISONMENT WITHOUT PAROLE

We, the Jury, recommend a sentence of life imprisonment without parole for Defendant _____

Date: _____

_____
Signature of Foreperson

-OR-

VERDICT FORM RECOMMENDING THE DEATH PENALTY

We, the Jury, recommend a sentence of death for Defendant _____

Date: _____

_____
Signature of Foreperson

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Y

Delta EDC Product Banner

Sku Number: 46122

Product Description: 1M Fat Jiggy Jumbo Cream 3ED V2

PIN Number: 00066313470 2

Order Date: 10/19/2020

Truck Number: 006

Bin Number: 014 001

Quantity: 1 of 1

Customer Number: 00091345 6

Invoice Number: 3789233 1

Product Barcode

Lexis POD Product Banner

Pub Number: 63122

Product Description: In Pat Jury Instr Crim 3ED V2

PIN Number: 0006631281702

Order Date: 10/18/2021

Truck Number: 005

Bin Number: 014 001

Quantity: 1 of 1

Customer Number: 0099415466

Invoice Number: 27825361

Product Barcode